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In the Supreme Court of the United States

OCTOBER TERM 1980

LULAC COUNCIL 11054 et al.,

Petitioner,

~~ROMAN BRADLEY, et al,~~

VS.

WILLIAM C. MILLIKEN, et al., and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Did the Court of Appeals erroneously affirm a denial of Intervention to Hispanic students who sought to protect Bilingual Education programs in a District undergoing desegregation?

PARTIES

LULAC COUNCIL 11054, LA SED, DANIEL and ELISA SAUCEDA by and through their next friend and parent ROSA SAUCEDA; JOEL and NOEL LEDESMA by and through their next friend and parent SOFIA LEDESMA,

Petitioners,

RONALD BRADLEY, RICHARD BRADLEY, by their Mother and Next Friend, VERDA BRADLEY; JEANNE GOINGS, by her Mother and Next Friend, BLANCHE GOINGS; BEVERLY LOVE, JIMMY LOVE and DARRELL LOVE, by their Mother and Next Friend, CLARISSA LOVE; CAMILLE BURDEN, PIERRE BURDEN, AVA BURDEN, MYRA BURDEN, MARC BURDEN and STEVEN BURDEN, by their Father and Next Friend, MARCUS BURDEN; KAREN WILLIAMS and KRISTY WILLIAMS, by their Father and Next Friend, C. WILLIAMS; RAY LITT and MRS. WILBER BLAKE, parents; all parents having children attending the public schools of the City of Detroit, Michigan on their own behalf and on behalf of their minor children, all on behalf of any persons similarly situated; and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, DETROIT BRANCH

v.

WILLIAM G. MILLIKEN, Governor of the State of Michigan, FRANK J. KELLEY, Attorney General of the State of Michigan; MICHIGAN STATE BOARD OF EDUCATION, a constitutional body corporate; JOHN W. PORTER, Acting Superintendent of Public Instruction, Department of Education and ex-officio Chairman of Michigan State Board of Education;

Respondents.

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LULAC Council 11054 et al. Proposed Intervenor-Plaintiffs Petition For A Writ Of Certiorari To Review The Opinion Of The United States Court Of Appeals For The Sixth Circuit.

OPINIONS BELOW

The opinion of the District Court is unreported. It is found in the Appendix to this Petition at page 1. The Per Curiam order of the Sixth Circuit is likewise unreported. It is contained in the Appendix at page 6. It is this ruling

that the Petition is directed toward. An opinion by the same panel on the merits of the case is included in the Appendix at page ..... These rulings were rendered on April 14, 1980.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Did the Court of Appeals erroneously affirm a denial of Intervention to Hispanic students who sought to protect Bilingual Education programs in a District undergoing desegregation?

STATUTES AND RULES INVOLVED

Rule 24, Federal Rules of Civil Procedure, 42 U.S.C. 2000(d); 20 U.S.C. 1703(F).

STATEMENT OF THE CASE

This Court has twice ruled in this case. In *Milliken v. Bradley,* 418 U.S. 717 (1974) (*Milliken I*), this Court established standards for expanding a remedy beyond the boundaries of a given school system. In *Milliken v. Bradley,* 433 U.S. 267 (1977) (*Milliken II*), this Court affirmed a District Court order mandating certain educational programs incident to the desegregation remedy.

While numerous Hearings, Trials and Appellate rulings have occurred during the ten (10) years of this litigation, a proper starting point for understanding this appeal is the last ruling of the Court of Appeals precedent to the April 14 rulings. In that ruling, *Bradley v. Milliken,* 540 F.2d 229 (6th Cir. 1976) aff'd 433 U.S. 267 (1977), the Court disapproved the total omission of three predominantly Black regions from a desegregation plan adopted

by the District Court. Although the Sixth Circuit remanded for reconsideration of this aspect of the District Court decree, it expressed its concern that little could be done given the ruling of this Court in *Milliken I,* 540 F.2d 229, 240.

In the Spring of 1978, Hearings pursuant to the remand occurred. At the termination of those Hearings on April 24, 1978, the Court expressed its belief that additional desegregation could be accomplished by utilizing approximately five (5) schools which had significant numbers of Hispanic students.[1] On that date the Court further expressed strong reservations about the need to continue bilingual education programs as desegregation occurred. Several excerpts from the transcript of that hearing highlight the Court's approach; the Court stated:

> If you are going to have all that bilingual, bicultural education down in Region 2 for Spanish, then you had better have it up here in Region 1 for black people and in Region 4 for black and white people and everything else. I hope you find the money someplace because it is wrong, and it is taking this District in the wrong direction once again. And I am not going to start that. I will nip that in the bud right now. (Transcript, April 28, 1978, p. 64.)

The Court concluded by observing that he had a draft memorandum opinion which:

> I am working on in this case that is going to disapprove the contained system for teaching bilingual bicultural education. I will not permit it in this District unless a higher Court tells me I must. On my authority, your own statistical data shows that it is resegregating

1. Each of these schools also had significant numbers of Black students. Webster School, the school that drew most of the attention of the Court has 38.6% Black students and their percentage is increasing.

> the entire system and that is the seed for resegregating every region in the District.
> (*Id.* 64-65)

On July 24, 1978, the Petitioners filed a Motion to Intervene. This Motion was filed in the name of two Hispanic organizations, five sets of parents and class composed of "all Hispanic school children who are eligible for bilingual programs in the Detroit Public Schools who may be affected by this Court's impending relief in such a manner as to be denied equal access to an equal educational opportunity". The request for relief was the protection of the right and interest of intervenors in all remedial actions taken by the Court.

On August 7 the Court issued its order. It ordered the School District to submit a further desegregation plan within fourteen (14) days which *inter alia* should "make provisions for bilingual bicultural programs . . .". The Court also disapproved the continued concentration of bilingual programs in Region 2. This ruling of the Court was stayed pending an Appeal which culminated in the April 14, 1980 rulings. On September 1, 1978, the District Court denied the Petitioner's Motion to Intervene.

SUMMARY OF ARGUMENTS

Reversal of the Court of Appeals ruling is of crucial importance to the interests of national origin minority children in Detroit and throughout the Country. If the rationales advanced for denying intervention are allowed to stand, then children will be effectively precluded from participation in the development of desegregation plans which just now are coming to grips with the need to reconcile bilingual education and desegregation.

The Detroit pattern is not unique. Most desegregation cases in this country are brought by Plaintiffs representing

a class of Black children. At the time that the District Court is ready to evaluate desegregation plans, it becomes apparent that special thought and expertise is required to protect the educational programs needed to assure equal educational opportunity for language minority students. *Lau v. Nichols,* 414 U.S. 563 (1974). As this Court is well aware the time between the filing of the complaint and the call for remedial plans is frequently a number of years. If, as the Circuit Court ruled, non-participation during the time-consuming "violation" stage precludes intervention under the "Timeliness" doctrine, language minority children will rarely be able to participate in protecting their rights to a linguistically appropriate education.

The second rationale advanced for denial of Intervention is likewise faulty and, if upheld, can serve as a basis for denial in virtually all cases. The Court ruled that because the District put on the stand their bilingual director to justify their contention that no further busing should be ordered, they (the Detroit School District) adequately represents the interests of language minority children. While Petitioners in this case have no reason to question the sincerity of the School District, it is manifest that they, as all other Districts, have conflicting masters and objectives in implementing a desegregation plan. Such conflicts create the real potential for conflicts of interest which pose serious dangers to the legal rights of language minority children.

This decision further deserves review for it conflicts with decisions in other Circuits. As previously stated, the question of Hispanic participation at the remedial stages of a desegregation case has become increasingly important. Intervention for purposes of protection of linguistically appropriate programs has been granted in Boston, *Morgan v. Kerrigan,* 401 F.Supp. 216, 242, 252 (D. Mass. 1975), *aff'd*

530 F.2d 401 (1st Cir. 1976) *cert. denied* 426 U.S. 935, and in Wilmington, Del, *Evans v. Buchanan,* 416 F. Supp. 328, 360 (D. Del. 1976) *aff'd* in relevant part 555 F.2d 373, 381 (3rd Cir. 1977) Appeal dismissed 429 U.S. 973, Reh. Den. 434 U.S. 944. Cf. *Ross v Eckles,* 468 F 2d 651 (5th Cir. 1972).

ARGUMENT

I. Petitioners' Motion To Intervene Was Timely

A. INTRODUCTION

Both Rule 24(a) and 24(b) require that motions for intervention be made upon timely application. While timeliness is a matter to be left to sound judicial discretion, it must be construed broadly in the context of the liberal construction accorded the Federal Rules of Civil Procedure. Such liberal construction is particularly appropriate in light of the underlying purpose of the intervention rules themselves—that of protecting the rights of unrepresented third parties; as many courts have noted:

> Timeliness is not a word for exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interests of justice. *McDonald v. E.J. Lavino Co.,* 430 F.2d 1065, 1074 (5th Cir. 1970). See also *Hodgson v. United Mine Workers of America,* 473 F2d 118 (D.C. Cir. 1972).

B. PETITIONERS DID NOT UNDULY DELAY IN THE FILING OF THE MOTION

While this litigation has been in progress since 1970, the timing of Petitioners' motion was not the result of undue and unreasonable delay. The posture of the litigation at the time of the Motion to Intervene raised interests and concerns to the Latino community which has not previously arisen. The need for intervention by LULAC Council No.

11054, LA SED and Latino parents and students at that time was triggered in a large part by the concerns expressed by the Court in the April, 1978 hearing regarding the placement of Latino children in bilingual programs in Region 2 schools and the effect of those programs on District-wide desegregation. This was the first time in the history of this protracted litigation that the placement of the minor Petitioners in bilingual programs was directly at issue.

Petitioners did not unduly delay between the time their interests were directly brought before the court in April and the filing of their motion in July. They attempted to come before the court before any order requiring further remedial action was entered and were prepared to participate in any remedial planning.

Moreover, even if intervenors are considered to have delayed in filing their motion, the mere passage of time, in the absence of prejudicial effect on the original parties, does not constitute grounds for denial of intervention. As stated by one court:

> In the present case McDonald seems to assume that the requirement of timeliness is a tool of retribution which can be used to punish a would-be intervenor for allowing time to pass before moving to intervene. We cannot agree with such a view. We think it is correct to say that since "the privilege of intervention stems from a desire to protect the rights of underrepresented third parties, it becomes apparent that the timely application requirement under Rule 24 was not intended to punish an intervenor for not acting promptly but rather was designed to insure the original parties should not be prejudiced by the intervenor's failure to apply sooner." Note, *The Requirement of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure,* 37 VA.L. REV.

863, 867 (1951). Accordingly, it has been the traditional attitude of the federal courts to allow intervention "where no one would be hurt and greater justice would be attained." *Id.* at 868. *McDonald v. E.J. Lavino, Co., supra,* 430 F.2d at 1074.

C. INTERVENTION WOULD NOT PREJUDICE THE ORIGINAL PARTIES TO THIS LAWSUIT

The existing parties to this action would not be prejudiced by granting of the motion to intervene. Despite the fears expressed by the District Court that "if [it] were to allow intervention, the parties would have to relitigate issues that have already been extensively litigated at great expense", Petitioners did not seek to and do not intend to relitigate any issue previously adjudicated. They merely seek to protect the rights of limited English speaking Latino children in any future remedial action.

Petitioners' desire to protect their interest in bilingual education does not require the wholesale exclusion of Latino or Spanish-surnamed students from a pupil reassignment remedy, as the District Judge apparently feared. At the outset, Petitioners do not seek to represent all Spanish-surnamed students, but only those students whose limited English speaking ability and special linguistic needs make bilingual education appropriate and necessary.

Additionally, Petitioners do not claim that the interests of even these students must be served by their exclusion from a pupil reassignment plan. Rather, we claim that these students' needs must be taken into account in the event that they are to be reassigned. Petitioners' sole desire in this litigation is to assist the parties and the Court in formulating future remedial plans in which the concepts of bilingual

education and desegregation are compatibly resolved.[2] We do not argue, as the District Judge believed, that certain students should not have to participate in the desegregation remedy.

Under these circumstances, Petitioners' participation in the proceedings would be limited to hearings yet to come at the time of their motion and to issues yet to be resolved. There would be no need to relitigate the issue of liability nor any remedial action already taken in this action. Thus, the existing parties would in no way be prejudiced.

Absent prejudice to existing parties, both mandatory and permissive intervention, with appropriate limitation where necessary, have been granted at virtually all stages of judicial proceedings. Thus, the case law is replete with grants of intervention at post-trial, post-judgment, post-consent decree, and post-appeal stages. See, *Hodgson v. United Mine Workers of America,* 473 F.2d 118 (D.C. Cir. 1972) (application timely seven years after trial); *McDonald v. E.J. Lavino Co.,* 430 F.2d 1065 (5th Cir. 1970) (application timely even though filed after entry of judgment); *Kozak v. Wells,*

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2. To this end Petitioners presented the District Court with examples of other litigation in which courts successfully struck a balance between bilingual education and desegregation in remedial pupil reassignment plans. (A. 75-76 and A. 160). The Boston desegregation case, *Morgan v. Kerrigan,* 401 F. Supp. 216 (D. Mass. 1975), *aff'd* 523 F.2d 917 (1st Cir. 1975) was the first to address the issue. The Court resolved the problem by first determining the percentage of minority and non-minority students who should be in each school. For example, a school might be required to have a 40% composition of minority students. The Court then determined that three consecutive bilingual classes was the minimal number necessary for effective programming. Three classes are comprised of sixty students. If those sixty students brought the minority percentage of the school to 20%, then there was space available for 20% black students and 60% Anglo. To effectuate this process, it was necessary first to identify limited English-speaking students; secondly, to determine minimally acceptable numbers for programming; and thirdly, to assign these students first and then to fill in other students. 401 F.Supp. 216, 242, 252.

278 F.2d 104 (8th Cir. 1960) (application timely after one year); *Innis v. Sperden & Co. v. Food Mach. Corp.*, 2 F.R.D. 261 (application timely after four years); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967) (application timely after six months).

Moreover, school desegregation cases such as the instant case, have long been recognized as deserving of judicial solicitude, and protected from ordinary procedural technicalities whenever possible. *See, e.g., United States v. Georgia*, 428 F.2d 377, 378 n.1 (5th Cir. 1970). The cases go overwhelmingly in favor of holding an intervention timely when not intended to impede desegregation.[3] *See, e.g., Pate v. Dade County School Board*, 303 F.Supp. 1068 (S.D. Fla. 1969) (intervention allowed to re-open school desegregation suit nine years after original court decree); *Keyes v. School District*, 380 F.Supp. 673, 694 (D. Col. 1974) (intervention by Mexican Americans allowed eight years after original filing, and following numerous court decrees, including an appeal to the Tenth Circuit and this Court); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 896 (5th Cir. 1966) (intervention timely after school board submitted plan in compliance with court decree); *cf. Robinson v. Shelby County Board of Education*, 330 F.Supp. 837 (W.D. Tenn. 1971) (dicta) (intervention would have been

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3. Appellants do not seek to impede desegregation in the instant case, but only to avoid random dispersal of students and teachers in bilingual programs with the subsequent destruction of such programs. They seek only to assist the court in formulating a reassignment plan which would allow the programs to continue as constituted or to be reconstituted effectively in another, possibly more integrated setting (A. 66-77). Thus, they are not in the same category as the proposed intervenors in *Robinson v. Shelby County Board of Education*, 330 F.Supp. 837 (W.D. Tenn. 1971) or *Hatton v. County Board of Education*, 422 F.2d 457 (6th Cir. 1970) relied on by the District Judge in denying their motion.

timely after two district court and one appellate court decisions); *Atkins v. Board of Education,* 418 F.2d 784 (4th Cir. 1969) (intervention timely where delay due to lack of funds).

Since most school desegregation cases involve relief of an injunctive nature which must prove its efficacy over a period of time, the timeliness requirement for intervention in these cases must be one of *substantive* timeliness. As was stated by the Tenth Circuit in a *per curiam* opinion:

> ... [P]roceedings of this nature (school desegregation) which continue over such an extended period of time are unique in respect to the timing of the arrival and departure of parties. In our opinion, intervention and withdrawal should be freely granted so long as it does not seriously interfere with the actual hearings.

Dowell v. Board of Education of Oklahoma City Public Schools, 420 F.2d 865, 868 (10th Cir. 1970). Thus, timeliness should not be perfunctorily rejected due to time elapsed, but is to be guided by the established rule that "[T]imeliness is to be determined from all the circumstances." *NAACP v. New York,* 413 U.S. 345, 366 (1973).

Under these standards, Petitioners' Motion to Intervene was timely. If granted, the intervention would not have interferred with past developments in the case and would have had an impact only on future remedial hearings.

II. Intervenors Are Entitled To Intervention of Right Pursuant To Rule 24(a)(2) of the Federal Rules of Civil Procedure

Rule 24(a)(2) of the F.R.Civ.P. provides:

> (a) *Intervention of Right.* Upon timely application, anyone shall be permitted to intervene in an action: ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest,

unless the applicant's interest is adequately represented by existing parties.

Thus, the Rule sets forth three requirements for intervention of right: (1) substantial interest; (2) possible impairment of the interest; and (3) inadequate representation —all of which were and are present in this case.

A. PETITIONERS HAVE A SUBSTANTIAL INTEREST IN THE OUTCOME OF THE LITIGATION BELOW

While the "interest" necessary to satisfy the requirements of Rule 24(a)(2) is not susceptible to precise definition, courts generally have agreed that a sufficient interest is shown where a prospective intervenor has demonstrated a meaningful stake in the outcome of an action. This liberal interpretation is consonant with the broad intent of the Federal Rules to assure all interested parties their day in court, and to dispose of lawsuits" . . . by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse v. Camp,* 385 F.2d 694, 700 (D.C. Cir. 1967).

Intervention of right is repeatedly granted to commercial interests concerned with the potential loss of their profits. See *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,* 368 U.S. 129 (1967) (a gas purchaser guarding against a competitive disadvantage by its supplier as the result of an antitrust suit); *Atlantis Development Corp. v. United States,* 379 F.2d 818 (5th Cir. 1967) (a development corporation seeking to assert its ownership over a coral reef as against the United States and two other companies) *Nuesse v. Camp, supra,* 385 F.2d 694 (D.C. Cir. 1967) (a state banking commissioner in an action brought by a state bank against the United States Comptroller of Currency seeking to enjoin the authorization of a particular national bank).

In this case, Petitioners seek to protect a more vital and substantial interest: the right of limited English speaking children to an equal educational opportunity. In *Lau v. Nichols,* 414 U.S. 563 (1974) this Court upheld the authority of the Department of Health, Education and Welfare (HEW) to require School Districts to take affirmative steps to overcome the English language handicaps of national origin minority children. Since that time Congress has passed legislation embodying and expanding this obligation (20 U.S.C. 1703(F)); HEW has issued clarifying guidelines requiring that elementary school students be taught in a language they understand while learning English[4], and many states have passed Bilingual Education legislation.[5] While each of these pedogogical and legal initiatives can be accommodated in a desegregation plan, conflict will necessarily occur if expertise and thought are not brought to bear on the issue. For example, the dispersal of limited English proficient students without consideration of their educational needs and legal rights can lead to the destruction of clusters which are needed to provide administratively viable programs. These interests have been protected where intervention has been granted. *Morgan v. Kerrigan, supra; Evans v. Buchanan, supra; Arthur v. Nyquist,* 1972-325 (W.D. NY July 9, 1976). Thus Petitioners' interest can and must be addressed in this and other desegregation litigation.

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4. "Task Force Findings Specifying Remedies Available For Eliminating Past Educational Practices Ruled Unlawful Under *Lau v. Nichols*", Summer, 1975.

5. As of June 1976, 23 states had bilingual education legislation or other special authorization for the teaching of limited English proficient students. "State Education Agencies and Language Minority Student", National Center For Education Statistics (1978). It is believed that this number has substantially increased in the past four (4) years.

B. PETITIONERS' INTERESTS WILL BE IMPAIRED UNLESS INTERVENTION IS GRANTED

Although pupil reassignment to achieve desegregation does not necessarily spell the destruction of bilingual programs, random dispersal of students and teachers in Detroit's programs could cause their demise. At the time of Petitioners' motion, no one was addressing how bilingual programs could be preserved in the context of desegregation orders. Unless Petitioners are allowed to participate in future remedial hearings, there is no guarantee that anyone will address this crucial issue.

The need to cluster students in order to achieve the fundamental objectives of bilingual-bicultural education is inescapable. The Office of Education has recently recommended that legislation designed to deal with the more general problem of discrimination be modified to accomodate the desperate need for ethnically identifiable groupings in bilingual programs.[6] The Massachusetts Bureau of Bilingual Education, the state agency, has found the failure to cluster students the single most debilitating feature of the Boston program.[7] The Comptroller General's Report to Congress concludes that concentration of students is essential.[8] The Bilingual Education Act (20 U.S.C. 880(b)) stipulates that age-grouping must be priority. In fact, the requirement in the Michigan law which mandates bilingual programing when the District has 20 or more students of a given language classification is an implicit acknowledgment of the

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6. U.S. Commissioner of Education. First Report to the President and the Congress. *The Condition of Bilingual Education in the Nation.* HEW Publ. #(OE) 77-01704 (Nov. 1976), p. 101.

7. Mass. Bureau of Transitional Bilingual Education. *Boston Review Report.* March, 1976. p. 3.

8. Comptroller General of the United States. *Report to the Congress. Bilingual Education: An Unmet Need,* Gov't Printing Office, Washington, D.C., May 19, 1976.

administrative and financial difficulties of providing for a few widely dispersed children.

Despite the need to cluster students for bilingual education to ensure a sufficient number for three or four consecutive classes in a given school and the need to place the teachers where the students are, the Detroit School Board's first plan pursuant to the August 7 order did not address these issues. It merely provided that children be moved from schools in Region 2 to schools in Region 1.

The plan did not provide for identification of limited English speaking ability or for concentration of these children in clusters adequate to pursue needed educational programs. It thus contained the seeds for destruction of existing programs without the mechanism for creating new programs. If children are dispersed randomly, there are unlikely to be sufficient clusters for conducting quality programs or sufficient numbers of qualified teachers to serve the needs of individual children scattered throughout the system.

If existing bilingual programs are disbanded and not replaced, the educational careers of Petitioners will be irreparably damaged and they will be deprived, at least for a time, of their right to bilingual instruction. Further, it may take years to reconstitute adequate programs.

C. PETITIONERS' INTERESTS AND THE INTERESTS OF THOSE THEY REPRESENT WILL NOT BE ADEQUATELY REPRESENTED UNLESS INTERVENTION IS GRANTED

Rule 24(a)(2) mandates that prospective intervenors, who otherwise meet its requirements, be granted intervention of right "unless their asserted interests are adequately represented by other parties".[9] The clear language of the

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9. Prior to the 1966 Amendment to the Rule, it required an affirmative showing that the existing representation of the prospective intervenor's interest "is or may be adequate".

Rule thus thrusts the burden on those opposing intervention to affirmatively demonstrate the adequacy of representation. This provision, like the other provisions of Rule 24, is to be construed liberally to permit intervention. *Nuesse v. Camp, supra,* 385 F.2d at 702. This Court has held that this requirement for intervention is satisfied:

> . . . if the applicant shows that representation of his interest *may be* inadequate, *and the burden of making that showing should be treated as minimal.* (emphasis supplied)
>
> *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 (1972).

The Black plaintiffs who are the original plaintiffs in this action do not adequately represent Petitioners' interests in securing equal educational opportunity for limited English speaking Latino children. While the District Judge erroneously believed that Petitioners, by their Motion to Intervene sought to exempt the Spanish-speaking from desegregation efforts, he correctly perceived that the plaintiffs did not represent Spanish-speaking interests. In the Memorandum and Order denying Petitioners' motion, he stated:

> Plaintiffs' only goal is to pursue their constitutional right to a unitary school system, and not to continue the concentration of bilingual programs in Region 2. The intervenors, on the other hand, seek a statutory right to bilingual programs. (A. 165)

The District Judge erroneously ruled and the Circuit Court affirmed, however, that the Detroit School Board adequately represented Petitioners' interests. This finding was based on the fact that the Detroit District had made a presentation concerning its bilingual programs to the Court and had opposed the Court's idea to disperse the

programs located in Region 2. The Court was of the impression that "the proposed intervenors could not have presented better evidence on their behalf", and that intervenors could not possibly match the District's expertise in bilingual education.

While Petitioners do not dispute that the District is conducting bilingual educational programs in Region 2, that the District's director of bilingual education can describe these programs, and that the District would prefer that the programs remain in Region 2, these factors do not in themselves indicate the highest possible degree of expertise. Neither do they necessarily indicate identity of interest and adequacy of representation. For example, after the August 7 order indicated that students must be reassigned from Region 2 to Region 1, it was Petitioners, not the District, who provided the Court with examples of pupil reassignment orders compatibly dealing with the concepts of bilingual education and desegregation.

While the school district has not affirmatively opposed the position taken by appellants and in fact agrees in some measure with their position, it does not adequately represent their interests within the meaning of Rule 24. The Board of School Directors has a potential conflict of interest in representing the school community at large and the particular interests of limited English speaking children.

One example of the type of conflict that can arise is reflected in the instant litigation. The School District has taken the position that the desegregation of Hispanic and Black students is counterproductive. This has led them, at various junctures, to gloss over the difference between Hispanic limited English speaking students and Hispanic students not in need of bilingual programming. In part,

these efforts triggered the District Court's antagonism toward bilingual education which led to the necessity of the intervention.

In a somewhat analogous situation, this Court held that an individual had a right to intervene in a lawsuit brought by the government to protect that individual's rights. *Trbovich v. United Mine Workers, supra.* There, the Secretary of Labor pursuant to his powers under the Labor Management Reporting and Disclosure Act sued to set aside certain union elections. A union member had unsuccessfully sought to intervene in that action.

This Court recognized that the Secretary had two distinct duties: one, to act as the "lawyer" of the individual union members to enforce their rights; and two, to protect the public interest in assuring democratic unions.

> Both functions are important, and they may not always dictate precisely the same approach to the conduct of litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union members may have a valid complaint about the performance of "his lawyer". Such a complaint . . . should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2). *Id.* at 538-539.

Similar potential conflicts exist in the instant situation. The Circuit Court failed to consider this fact, and thus misapplied the law.

CONCLUSION

The Circuit Court found that Petitioners' interests were "legitimate and substantial", yet it denied our motion to intervene. Its ruling, allowed to stand, will affect not only the language minority children in Detroit but will set precedent which could deny participation by language minority children throughout the Country in formulating orders

which are essential to their receipt of equal educational opportunity. Because the Circuit Court ruling is bad policy and founded on a misapplication of the law, it should be reversed. This Petition for Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Attorneys for Petitioners

Dated: July 21, 1980.

Appendix

United States District Court
Eastern District of Michigan
Southern Division

September 1, 1978

CIVIL ACTION

No. 35257

RONALD BRADLEY, et al.,
Plaintiffs,

and

LULAC Council No. 11054,
a Non-Profit Corporation, et al,
Plaintiffs-Intervenors,

vs.

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,
Defendants.

MEMORANDUM AND ORDER

LULAC Council No. 11054 and the other named intervernors have filed a "Proposed Complaint in Intervention" and a separate "Motion To Intervene As Parties Plaintiff." These proposed intervenors are individual children and organizations whose members include parents of Spanish-surnamed children participating in bilingual programs in the Detroit Public Schools. They seek intervention "to insure that the Bilingual Education programs they are entitled to receive do not suffer as a result of the implementation of a remedial plan in Region 2 or elsewhere . . . ." Complaint ¶ 3.

In their motion to intervene, the proposed intervenors contend that they are entitled to intervene as a matter of right, pursuant to Fed. R. Civ. P. 24(a). They argue that

they, and the separate class they seek to represent, have a substantial interest in any remedial plan adopted by the court which includes Region 2, where they and a majority of their class live; that they have unique educational needs which require an expertise that existing plaintiffs do not have; and that only they can protect the current program for bilingual education in Region 2. Alternatively, the proposed intervenors seek permissive intervention, pursuant to Fed. R. Civ. P. 24(b).

Only the defendant Detroit Board and the State defendants filed a response to the motion to intervene. The defendant Detroit Board does not take a definitive position with respect to the motion, but they reserved the right to appear and argue at any future hearing. The State defendants oppose intervention, arguing that the interest of Spanish-surnamed students in bilingual programs is now adequately represented by the plaintiffs. The State defendants further argue that the petition is untimely since it was filed more than seven years after this action was commenced and three years after this court's remedial decree. The moving parties did not request a hearing, and we are now prepared to rule on the merits of their motion to intervene.
See Local Rule IX(j).

We cannot agree with the State defendants that the interests of the proposed intervenors are adequately represented by the plaintiffs. As we understand the proposed complaint for intervention, the movants seek to exclude Region 2 from any pupil reassignment plan because, in their view, the bilingual classes they attend would otherwise be detrimentally affected. Plaintiffs, on the other hand, object to restricting bilingual programs to one region because it provides neighborhood schools for one ethnic group to the exclusion of all others. Therefore, the plaintiffs did not and

cannot represent the interests of the proposed intervenors. Plaintiffs' only goal is to pursue their constitutional right to a unitary school system, and not to continue the concentration of bilingual programs in Region 2. The intervenors, on the other hand, seek a statutory right to bilingual programs.

We do agree with the State defendants, however, that this motion is untimely. LULAC did not apply for intervention until long after the evidentiary hearings were over and our opinion was prepared for filing. In that opinion we disapproved of the Board's wholesale exclusion of Spanish-surnamed students from the pupil reassignment remedy. We have already held that:

> This case began as and remains a racial desegregation case, and for school assignment purposes Spanish-surnamed students cannot be treated differently than other white students. Bilingual education is not a justification for treating one ethnic group in isolation nor is it a substitution for desegregation. Opinion of August 7, 1978, at 24 (citation omitted).

In any event, the defendant Detroit Board has more than adequately protected the interests of the proposed intervenors. At the latest hearings, the Detroit Board called as an expert witness Mr. Felix Valbuena, the Director of Bilingual, Bicultural Education for the Detroit Public Schools. Mr. Valbuena made a careful presentation of the bilingual program in the city and explained the need to preserve those programs. The Detroit Board vigorously opposed every suggestion that would disturb current bilingual programs in Region 2. *See* Opinion, August 17, 1978 at 23-24. We are persuaded that the proposed intervenors could not have presented any better evidence in their own behalf.

In *Robinson v. Shelby County Board of Education,* 330 F. Supp. 837 (W.D. Tenn. 1971), the court refused to allow white pupils and parents to intervene in order to challenge an order clustering a white school with a black school. The court there also indicated that the interests of the proposed intervenors were adequately protected by the defendant Board of Education. *Id.* at 849. The instant case is very similar in that here certain students are really arguing that they should not have to participate in the desegregation remedy. *See Hatton v. County Board of Education,* 422 F.2d 457, 461 (6th Cir. 1970); *cf. Penick v. Columbus Education Association,* 574 F.2d 889 (6th Cir. 1978).

In addition, we decline to allow the proposed intervenors to intervene under Fed. R. Civ. P. 24(b). The motion to intervene is simply much too late. If the court were to allow intervention, the parties would have to relitigate issues that have already been extensively litigated at great expense. *See Penick v. Columbus Education Association,* 574 F.2d 889 (6th Cir. 1978). Moreover, the intervenors could not possibly match the expertise of the Detroit Board in Bilingual/Bicultural Education. Since the Detroit Board and the intervenors have identical goals, no useful purpose could be served by granting intervention pursuant to Rule 24(b).

NOW, THEREFORE, IT IS ORDERED that the motion to intervene be, and hereby, is DENIED.

.....

ROBERT E. DEMASCIO
United States District Judge

Dated: September 1, 1978

PURSUANT TO RULE 77(d), FED. R. CIV. P. COPIES HAVE BEEN MAILED TO THE FOLLOWING:

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.....

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.....

.....

Louis R. Lucas, Esq., Thomas Atkins, Esq.
George T. Roumell, Esq.
George L. McCargar, Esq.
Theodore Sachs, Esq. ?????
ON September 1, 1978.

Sherry Stamps

.....

DEPUTY COURT CLERK

Appeal on old P. App. 47 Follows—

Appeal from the United States District Court
for the Eastern District of Michigan.

RONALD BRADLEY, et al.,
Plaintiffs,
LULAC COUNCIL No. 11054, et al.,
Proposed Plaintiffs Intervenors-Appellants,
v.
WILLIAM G. MILLIKEN, et al., and BOARD OF EDUCATION
of the School District of the City of Detroit, et al.,
Defendants-Appellees.

Decided and Filed April 14, 1980.

Before: EDWARDS, Chief Judge, and PHILLIPS and PECK, Senior Circuit Judges.

PER CURIAM. LULAC Council No. 11054, et al. appeal from the district court's decision denying their application to intervene in the remedial phase of the Detroit school desegregation case. We affirm the district court's decision, but direct that appellants be permitted to intervene for the limited purpose of presenting evidence on a question not previously litigated in the district court.

Appellants sought to intervene in *Bradley v. Milliken,* Civ. No. 35257 (E.D. Mich.), in order to protect the interest of Detroit's Hispanic students in receiving bilingual education. That interest, appellants felt, was imperiled by the district court's order that some white students in Detroit's Administrative Region 2 be reassigned to desegregate schools in the city's all-black inner city. Most of Detroit's Hispanic students live in Region 2, and all of the system's Spanish-bilingual programs are located there. Appellants are concerned that indiscriminate reassignment of Hispanic

students to inner-city schools will produce shortages of Spanish-bilingual teachers and resource materials, interfere with established pilot programs, and generally impair the district's ability to meet the educational needs of Hispanic students. Accordingly, they sought to participate as parties in the development of a pupil-reassignment plan that would be sensitive to their concerns.

The district court, in an opinion reported at 460 F.Supp. 320 (E.D. Mich. 1978), denied appellants' application to intervene on the ground that it was untimely. The court understood appellants to argue that Hispanic students should be excluded entirely from the pupil-reassignment plan. However, the court had already rejected the Board's argument for excluding Hispanos; it thought allowing appellants to intervene would force relitigation of that issue. Furthermore, the court felt the appellants' interest was already represented by the Detroit Board, whose expertise and resources the appellants could not match. Accordingly, the court held appellants had no right to intervene and declined to allow permissive intervention.

We agree with the district court that appellants have no right to intervene. Even accepting appellants' argument that they do not seek to exempt Hispanic students from reassignment but merely to ensure that reassignments are made with students' bilingual-educational needs in mind, we think appellants' interest is adequately represented by the Detroit Board. Dr. Felix Valbuena, the Director of Bilingual Education for the Detroit school system, cautioned the court that reassigning Hispanic students out of Region 2 schools, let alone doing so indiscriminately, would jeopardize the district's ability to provide quality bilingual education as required by law. Recognizing that danger, yet faced with this court's mandate to desegregate inner-city

schools, the district court ordered the Detroit Board to develop a reassignment plan that would "make provisions for bilingual/bicultural programs" and to "create new programs [where necessary] to maintain the current level of bilingual/bicultural offerings." We have every reason to believe the Board has and will continue to observe the court's order. Given the Board's demonstrated concern for preserving its bilingual programs, we think the appellants' interest already is adequately represented. Accordingly, we affirm the district court's decision that appellants are not entitled to intervene of right.

Nor did the district court abuse its discretion by denying permissive intervention in the pupil-reassignment proceedings. This case is already ten years old. Permitting the appellants to participate as parties in the development of a supplemental reassignment plan would delay further these already protracted remedial proceedings without producing any countervailing benefit.

Appellants can protect their interest, which we recognize is legitimate and substantial, by petitioning the district court to allow them to speak as *amici curiae* on behalf of the Spanish-speaking children of Detroit in future remand proceedings. Correspondingly, we suggest the court encourage and consider such *amicus* views in evaluating any reassignments of Hispanic students.

Despite our affirmance of the district court's ruling, we think appellants must be permitted to intervene for the limited purpose of presenting evidence on the question whether, historically, the defendants have practiced de jure segregation of Hispanos. That issue, not previously litigated, was raised by the Board's argument in *Bradley v. Milliken,* case nos. 78-1597, 79-1005, that Hispanos cannot be treated as white for school desegregation purposes. For

the reasons stated in Part IV of our opinion in that case, — F.2d at —, we think representatives of Detroit's Hispanic community must be allowed to participate as intervenors in the remand hearing on the limited issue of whether or not the Detroit Board has been guilty of de jure segregation of Hispanos. *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 197-98 (1973); *United States v. Midland Independent School District*, 519 F.2d 60, 63-64 (5th Cir. 1975), *cert. denied*, 424 U.S. 910 (1976); *Tasby v. Estes*, 517 F.2d 92, 106-07 (5th Cir.), *cert. denied*, 423 U.S. 939 (1975). Appellants may participate on other issues only if the district court permits them to do so as *amici*.

The case is remanded to the district court for further action consistent with this opinion. No costs are taxed. Each party will bear its own costs on this appeal.

Nos. 78-1597 and 79-1005

United States Court of Appeals
For the Sixth Circuit

APPEAL from the United States District court for the Eastern District of Michigan.

RONALD BRADLEY, ET AL.,

Plaintiffs-Appellees,

v.

WILLIAM G. MILLIKEN, GOVERNOR, ET AL.,

Defendants-Appellees,

and

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, ET AL.,

Defendants-Appellants.

Decided and Filed April 14, 1980.

Before EDWARDS, Chief Judge, and PHILLIPS and PECK, Senior Circuit Judges.

PHILLIPS, Senior Circuit Judge. On July 25, 1974, the Supreme Court remanded this case to the district court for "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970." *Milliken v. Bradley,* 418 U.S. 717, 753 (1974) (*Milliken* I). Nearly six years have elapsed since that remand, and almost ten years since this litigation began, yet we are unable to hold on the record before us that de jure segregation has been elimi-

nated from the Detroit school system. We conclude that we must send the case back to the district court for further proceedings.

The present appeal presents four questions for decision: (1) Did the district court err in holding that population and demographic changes in Detroit have obliterated all traces and effects of past acts of discrimination by the Detroit School Board and the State of Michigan? Part II of this opinion rejects the ruling of the district court as contrary to the law of this case and clearly erroneous. (2) Was the district court correct in holding that the overwhelming percentage of black students in the Detroit school system precludes including in the pupil assignment plan any of the schools in the three inner-city regions of the school district? Part III of this opinion concludes the district court's holding was error, and outlines the standards to be applied by the district court when it reconsiders inner-city pupil reassignment on remand. (3) Was it error for the district court to order additional pupil reassignments between schools in Regions 1 and 2? Part IV of the opinion affirms in principle the propriety of additional pupil reassignments, but remands the case for a hearing on the question whether Hispanic students should be treated as white for desegregation purposes. (4) Did District Judge Robert E. DeMascio abuse his discretion in declining to recuse himself from the remand proceedings in this case? Part V finds no abuse of discretion, but suggests, in view of the bitter feelings that have developed, that the case be reassigned to another judge on remand from this court's decision on the present appeal.

I

This protracted litigation began in 1970. On April 7 of that year, the Detroit Board voluntarily adopted a modest plan to desegregate some of the Detroit high schools. The State legislature, however, blocked implementation of that plan by enacting § 12 of Act No. 48, Public Acts of 1970. A citizen-initiated recall election resulted in the replacement of the four Board members who had favored the April 7 plan, and the reconstituted Board rescinded the plan.

The plaintiffs filed this suit on August 18, 1970, alleging that § 12 of Act No. 48 was unconstitutional and praying for a preliminary injunction requiring the Board to implement the April 7 plan. The late District Judge Stephen J. Roth denied plaintiffs' application for a preliminary injunction and they appealed. This court held § 12 of Act No. 48 unconstitutional, but affirmed the denial of a preliminary injunction and remanded for a trial on the merits. 433 F.2d 897 (6th Cir. 1970). On remand, Judge Roth again refused to grant a preliminary injunction, and this court affirmed, again directing a trial on the merits. 438 F.2d 945 (6th Cir. 1971).

The case was tried on the issue of segregation April 6, 1971, to July 22, 1971. On September 27, 1971, Judge Roth issued his ruling on the issue of segregation, finding both the State of Michigan and the Detroit Board[1] had com-

1. Nothing in this opinion is intended to reflect adversely upon the present Detroit Board of Education. Throughout the course of this often bitter litigation members of the present Board have cooperated with the district court's endeavor to remedy the unconstitutional de jure segregation created by acts and policies of their predecessors and former State officials. References in this opinion to the Board's discriminatory acts should be read as references to the actions of past, not present, Board members.

mitted "acts which have been causal factors in the segregated condition of the public schools in the City of Detroit," 338 F.Supp. 582, 592 (E.D. Mich. 1971).

Judge Roth determined that true desegregation could not be accomplished within the geographical limits of Detroit. Distributing the relatively small number of white students remaining in the district throughout the schools, he held, would render the entire system identifiably black. Accordingly, he ordered the defendants to submit metropolitan plans for desegregation. 345 F.Supp. 914 (E.D. Mich. 1972).

This court, sitting en banc, affirmed both the finding of de jure segregation and the propriety of an interdistrict remedy. 484 F.2d 215 (6th Cir. 1973).

The Supreme Court granted certiorari and reversed in part. The Court held the district court had no equitable power to include in its remedial decree any school district whose racial composition had not been shown to be the product of de jure segregation. The defendants did not, however, challenge the district court's finding of de jure segregation within the city of Detroit. Accordingly, the Court remanded the case for formulation of a Detroit-only remedial decree. 418 U.S. 717 (1974) (*Milliken* I).

Judge Roth had died shortly before the Supreme Court issued its opinion, and District Judge Robert E. DeMascio was assigned the difficult task of formulating a decree which would eliminate the effects of de jure segregation from the Detroit school system without transgressing the limits set by the Supreme Court in *Milliken* I. Judge DeMascio required the parties to submit desegregation plans, but rejected them as unsatisfactory. His August 15, 1975 opinion, reported at 402 F.Supp. 1096 (E.D. Mich. 1975), established guidelines to be met by an acceptable remedial plan. Hereafter, they are referred to as the August 15 guidelines.

On November 4, 1975, Judge DeMascio adopted a desegregation plan drafted by the Detroit Board in an effort to conform to the August 15 guidelines. 411 F.Supp. 943 (E.D. Mich. 1975). This plan provided for changes in pupil assignments in five of the eight administrative regions of the Detroit school district, excluding inner-city Regions 1, 5 and 8 which are overwhelming black. In addition, the remedial decree provided for various Educational Components, requiring establishment of certain training, remedial, testing, counseling, monitoring and public relations programs.

This court affirmed the remedial decree's Educational Components and the portion of the pupil reassignment plan that required reassignments within Regions 2, 3, 4, 6 and 7. We found that excluding Regions 1, 5 and 8 from the pupil reassignment plan left approximately 83,000 students with no relief from unconstitutional de jure segregation. Moreover, we noted, these three Regions are in the area most affected by the previously found illegal acts. This being the case, the Board had assumed the burden of showing that the segregation existing in Regions 1, 5 and 8, which were excluded from the plan, was not the result of the defendants' present or past discriminatory actions. Since the record disclosed no adequate justification for limiting the pupil reassignment plan to five Regions, we remanded the case for further consideration in regard to schools located in the inner-city Regions. 540 F.2d 229 (6th Cir. 1976).

The Supreme Court affirmed the propriety of the decree's Educational Components, and their validity no longer is an issue in this case. Neither the district court's pupil reassignment plan nor this court's partial reversal was challenged in the Supreme Court, and it had no occasion to rule thereon. 433 U.S. 267, 279 (1977) (*Milliken* II).

Before the district court commenced remand proceedings, the plaintiffs moved Judge DeMascio to recuse himself from

the case. Relying on 28 U.S.C. § 455(a) and Canon 3A(4) of the Code of Judicial Conduct, the plaintiffs complained that Judge DeMascio had created an appearance of partiality by engaging in *ex parte* contacts with experts, community groups and the Detroit Board in the process of developing his desegregation guidelines and remedial decree. Judge DeMascio declined to recuse himself. 426 F.Supp. 929 (E.D. Mich. 1977). However, he referred to the Chief Judge of the District the question whether his prior conferences with the Detroit Board and the teachers' union aimed at averting a strike, coupled with his August 28, 1975, order directing faculty reassignments, had created the appearance that he had prejudged the faculty assignment issue. On referral from the Chief Judge, District Judge James P. Churchill agreed with Judge DeMascio that recusal was not required. 426 F.Supp. at 943-44.

On the merits, Judge DeMascio reaffirmed his prior conclusion that Regions 1, 5 and 8 need not and cannot be included in the pupil reassignment plan. 460 F. Supp. 299 (E.D. Mich. 1978). He held that pronounced demographic shifts, together with the predominance of the black student population, have obliterated the effects of defendants' prior acts of de jure segregation. Current residential patterns, not school assignments, he said, account for the one-race character of the inner-city schools. Accordingly, Judge DeMascio held that the present assignment pattern is free from the vestiges of prior discrimination and that the Board had borne its heavy burden of justifying the exclusion of the inner-city regions from the pupil reassignment plan. 460 F. Supp. at 307-08.

Nevertheless, the court found there were some white students available in Region 2 to desegregate certain Region 1 schools. The Board objected that many of these white

students were Spanish dominant Hispanics involved in bilingual educational programs that would be disrupted by additional pupil reassignments. However, Judge DeMascio felt this court's opinion mandated whatever reassignments were possible, despite any burden on bilingual programs. 460 F. Supp. at 312. In a supplemental opinion, Judge DeMascio ordered the Detroit Board to develop a plan for reassigning pupils between Regions 1 and 2 which would provide for bilingual education in receiving schools. On November 11, 1978, the court adopted the Board's responsive plan. 460 F. Supp. 325 (E.D. Mich. 1978).

The Detroit Board appeals on the ground that the district court exceeded its authority by ordering additional pupil reassignments between Regions 1 and 2. The plaintiffs cross-appeal from Judge DeMascio's decision not to recuse himself, his holding that demographic changes have obliterated the effects of defendants' prior discriminatory acts, and his conclusion that Region 1, 5 and 8 were properly excluded from the pupil reassignment plan. This court stayed implementation of the additional reassignment plan pending the outcome of this appeal.

II

The first question we address is whether Judge DeMascio was correct when he decided that demographic changes and the growth of the Detroit school system's proportion of black students have obliterated the effects of defendants' past discriminatory actions. We conclude that this holding of the district court is refuted overwhelmingly by the record.

Judge DeMascio's conclusion apparently was based on his belief that the only effect of defendants' past discrim-

inatory actions was to allow white students to escape from integrated schools in racially changing residential areas:

> This was so because the actions which formed the basis for Judge Roth's liability findings were basically reactions by the Detroit Board of Education to changing residential patterns. The optional and gerrymandered attendance zones served the purpose of keeping white students out of schools that, in the absence of such polices, would have become, and in fact have become, integrated naturally. Judge Roth did not find, however, that these policies in turn created additional residential segregation which in turn created additional school segregation. Had he made such findings, and had such findings been supported in the record, we assume the Supreme Court would have affirmed the propriety of an interdistrict remedy.
> 460 F. Supp. at 307-08.

Accordingly, Judge DeMascio thought the defendants' actions could have had only temporary segregative effects, effects that have been nullified by the almost total displacement of whites from formerly integrated neighborhoods:

> These pronounced demographic shifts, first predicted by Judge Roth, and the predominance of the black student population have obliterated the optional and gerrymandered attendance zones which permitted white students to avoid attending integrated schools, the practice of bussing black students from overcrowded schools beyond a closer white school and the practice of altering feeder patterns in racially changing neighborhoods.
> (Footnote omitted.) 460 F. Supp. at 307.

The problem with this conclusion of the district court is that it is contrary to the law of this case as established by Judge Roth and affirmed by this court and by the Supreme Court in *Milliken* I.

Judge Roth found that the Detroit Board had done at least four things to maintain a dual school system in Detroit: First, during the 1950's, the Board "created and maintained optional attendance zones in neighborhoods undergoing racial transition and between high school attendance areas of opposite predominant racial compositions." 338 F. Supp. at 587. "The natural, probable, foreseeable and actual effects of these optional zones was to allow white youngsters to escape identifiably 'black' schools." *Id.* Second, the Board "admittedly bused black pupils past or away from closer white schools with space available to black schools," but only in one instance, necessitated by the burning of a white school, did the Board bus white children to a black school. 338 F.Supp. at 588. Third, the Board "created and altered attendance zones, . . . grade structures and . . . feeder school patterns in a manner which . . . [maintained] black and white pupils in racially segregated schools." *Id.* Finally, by constructing many small schools and locating new schools in areas of one race, the Board negated opportunities to integrate, contained the black population, and compounded school segregation. *Id.*

The plaintiffs presented evidence that the Board's discriminatory actions affected not only schools but residential patterns. For example, in affirming Judge Roth's finding of de jure segregation, this court quoted the following exchange between plaintiffs' counsel and Dr. Gordon Foster of the University of Miami, director of the Florida School Desegregation Consulting Center, concerning optional attendance zones:

> "Q. Doctor Foster, from your examination of the 1950 census and in turn the 1960 census exhibits, do

you have an opinion as to the effect of such an optional zone on the community residence pattern in the community?

* * *

"A. Community people and residents in a situation such as this generally have a perception that there is something wrong with their school, that the whites need an optional zone to get out into a less black situation and, therefore, this increases their perception of racial isolation and, in fact, physical containment.

"Q. Does this have an effect, Doctor, in terms of the residence pattern? I believe you testified in 1950 the optional area was entirely white to zero to 4.9 per cent white.

* * *

"A. In my opinion this tends to increase the instability of the community because they generally feel this is an ad hoc temporary interim situation and it increases white flight in this sort of situation.
484 F.2d at 234.

At another point, Dr. Foster testified that locating new schools in one race areas rather than integrated areas tends to isolate the new school's attendance zone and perpetuate its racial identity. 484 F.2d at 238.

Responding to this and other evidence, Judge Roth found the Board's discriminatory policies were partially responsible for segregated residential patterns:

> Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area.
>
> . . . [A]ll of them, including the school authorities, are, in part, responsible for the segregated condition

> which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corrseponding effect on the residential pattern by the racial composition of the schools.
> 338 F. Supp. at 587.

See also Judge Roth's seventh conclusion of law, 338 F. Supp. at 593.

In affirming Judge Roth's findings on the issue of segregation, we stated:

> This record contains a substantial volume of testimony concerning local and State action and policies which helped produce residential segregation in Detroit and in the metropolitan area of Detroit. In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except *as school construction programs helped cause or maintain such segregation.*
> 484 F.2d at 242 (emphasis supplied).

See also Millikin I, *supra,* 418 U.S. at 724 and 728 n.7 (acknowledging Judge Roth's and this court's partial reliance on de jure school segregation as one cause of residential segregation).

Moreover, Judge Roth's conclusion that present Detroit housing patterns reflect the Board's past discrimination accords with the analysis of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 20-21 (1971):

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of location and ca-

pacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning." Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

See also Adams v. United States, — F.2d —, slip op. at 34 (8th Cir. Mar. 3, 1980) (massive demographic shifts that have rendered the St. Louis school district 75 per cent black

have incorporated rather than wiped out the segregative effects of the system's prior de jure discriminatory policies: "public perception of the racial identity of a school can be, and often is, a powerful factor in shaping the residential patterns of a neighborhood").

In *Keyes v. School District No. 1,* 413 U.S. 189 (1933), the Supreme Court held that the discriminatory practices of a school district may have the effect of earmarking a school according to its racial composition, and this, in turn, may have a profound reciprocal effect on the racial composition of residential neighborhoods. The Court said:

> "[T]he practice of building a school . . . to a certain size and in a certain location 'with conscious knowledge that it would be a segregated school,' . . . has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools."
> 413 U.S. at 201-02.

The clear import of Judge Roth's holding is that the defendants' discriminatory policies helped to drive whites from the Detroit school district and to contain blacks in an ever-expanding core area of the city. Viewed in this light, Judge DeMascio's holding, urged by the Board before this court, is that the segregative effects of the defendants' discriminatory policies have been obliterated by the very demo-

graphic changes those policies helped to produce. We conclude that this argument refutes itself.

It is the law of this case that the unconstitutional actions of defendants, both local and State, contributed to the segregated residential patterns and the one race schools that now exist in Detroit. Judge Roth found that de jure school segregation encouraged whites to flee from racially changing neighborhoods and ultimately from the Detroit school district. That finding is supported by substantial record evidence and ample legal precedent. This being so, we reverse Judge DeMascio's holding that population changes have obliterated the effects of the Board's past discrimination. This holding is contrary to the law of this case and, treated as a finding of fact, is clearly erroneous. On the contrary, the record demonstrates that these population changes themselves are in part vestiges of past discrimination.

III

We turn our attention next to the holding of the district court that the overwhelming percentage of black students in the school district as a whole and particularly in the inner-city regions, coupled with the small number of white students even theoretically available for reassignment, foreclose the possibility of including any schools located in Regions 1, 5 and 8 in the pupil reassignment plan. We find this holding constitutionally insupportable.

The last time this case was before us, we reversed the exclusion by the district court of the inner-city regions from the pupil reassignment plan. We recognized then that "the overwhelming number of black students in Detroit and their concentration in the inner-city undoubtedly makes some one-race schools unavoidable under any 'Detroit only' remedy."

540 F.2d at 237. However, in order to justify eliminating the inner-city regions entirely, we said, the Board would have to show the resultant all black schools are not the product of past discrimination. This would be particularly difficult, we warned, because these very regions were the ones hardest hit by past acts of de jure segregation. 540 F.2d at 238. "We cannot hold," we concluded, "that where unconstitutional segregation has been found, a plan can be permitted to stand which fails to deal with the three regions where the majority of the most identifiably black schools are located." 540 F.2d at 240.

On remand, the Detroit Board attempted to justify its exclusion of Regions 1, 5 and 8 by presenting evidence that the shift from white to black in the district had accelerated well beyond former demographic predictions and made inner-city desegregation impossible. The Board's figures established that the percentage of black students in the district is increasing despite a decline in the total enrollment. Of the children who enter Detroit kindergartens, a greater proportion of blacks than whites remain in the system throughout their school years. Mr. Hendrickson, the Board's expert, projected the district's enrollment would be 91.8% black by 1981. Moreover, the district court found, residential areas near the school district's fringe are becoming increasingly black as inner-city families replace whites who leave the district entirely. 460 F. Supp. at 305-07.

Judge DeMascio felt the Board's evidence established that no more desegregation of Regions 1, 5 and 8 is possible. 460 F. Supp. at 307. He concluded that integrating the inner-city schools would require the Board to scatter the remaining white students to such an extent that there would be no meaningful interaction between the races in any school. The

result would be mere token integration of the inner-city schools achieved at the cost of disrupting previously approved assignment patterns that effectively desegregate the schools in other regions.

To illustrate the futility of attempting to include the inner-city regions, Judge DeMascio turned to statistics. Pointing out that the district court had repeatedly rejected the notion of making all schools identifiably black, Judge DeMascio held that only the excess of non-black over black students in any given school could be considered available for reassignment to schools in Regions 1, 5 and 8. The Board's evidence showed there were 31 majority white elementary schools in the district with 3397 students available for reassignment. Six middle schools had 733 students available and one high school had 175. However, the Board's evidence also showed the black enrollment in inner-city elementary schools was 38,259 or 11 times the number of whites available for reassignment. The comparable figures for inner-city middle and high schools were 17,015 and 17,783, or 23 times and 100 times the respective numbers of white students available for reassignment. 460 F.Supp. at 310. Accordingly, the court found, to disperse these few available white children among the schools in Regions 1, 5 and 8 would accomplish nothing more than token integration, a result this court had previously rejected. 460 F.Supp. at 310, citing 540 F.2d at 239.

The flaw in the district court's logic was its assumption that Regions 1, 5 and 8 must be treated as units, and that integrating schools in these Regions must be an all-or-nothing proposition. Form the outset of this litigation's post-*Milliken I* remedial phase, Judge DeMascio seems to have assumed that the inner-city regions must be treated in isolation from the rest of the district. *See, e.g.*, 402 F. Supp. at

1129 (holding that the negligible benefits of including the inner-city do not justify "the extraordinary remedy of such cross-regional bussing"). Yet it was exactly this unitary treatment of Regions 1, 5 and 8 that led us to reverse and remand the last time this case was before us. Citing *Davis v. Board of Commissioners of Mobile County,* 402 U.S. 33, 38 (1971), in which the Supreme Court refused to permit isolated treatment of one part of metropolitan Mobile, we found it "equally unacceptable to treat Regions 1, 5 and 8 in isolation from the rest of the Detroit school system." 540 F.2d at 238.

We see no reason to treat the borders of the Detroit school system's inner-city administration regions as sacrosanct. In the first place, Detroit's regional scheme of school administration originated with Act No. 48, Public Laws of 1970, the same law whose §12 we found to be an unconstitutional interference with the Board's attempts to desegregate Detroit high schools. Were we to view the Act's remaining provisions as creating barriers to constitutionally required desegregation, we would have to hold them unconstitutional also. *United States v. Scotland Neck Board of Education,* 407 U.S. 484, 489 (1972); *Wright v. Council of the City of Emporia,* 407 U.S. 451, 461-62 (1972). Furthermore, there is nothing in the Supreme Court's holding in *Milliken* I, *supra,* 418 U.S. at 745-46, that renders inviolable the lines of Administrative Regions within the Detroit School District. Judge Roth's ruling that the Detroit Board carried out a systematic program of segregation established a predicate for finding a dual school system in all the regions. *See Keyes v. School District No. 1, Denver Colo.,* 413 U.S. 189, 201 (1973). In such a situation, a district court may disregard the boundaries of administrative regions in order

to vindicate constitutional rights. *Milliken* I, *supra,* 418 U.S. at 745.[2]

The district court erred when it held that Regions 1, 5 and 8 must be excluded in their entirety from the pupil reassignment plan. The proper inquiry after this court's last remand was not whether there are enough white students available to desegregate *every* inner-city school. This court has recognized from the first that some one race schools are unavoidable under a Detroit-only plan. *See* 540 F.2d at 237; 484 F.2d at 249. It, therefore, is irrelevant that there are 11 times as many black students in all the inner-city elementary schools combined as there are white students available for reassignment. What is crucial is whether those 3,397 white students can practically be reassigned to achieve effective levels of desegregation in *some* of the inner-city schools. That, and the analogous questions concerning the middle and high schools, are the issues the district court should have addressed and is directed to address on remand from this decision. The small number of white students available for reassignment and the problems involved in transporting them may justify excluding some, and perhaps many, inner-city schools from the pupil reassignment plan. We emphasize that the need to cross regional lines does not justify such exclusion.[3]

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2. In fact, Judge DeMascio's remedial guidelines specified that, when the Board attempted rezoning to achieve integration in other regions without transporting students, "regional lines need not be respected; when the choice is between preserving regional lines and bussing, regional lines must give way." 402 F.Supp. at 1134.

3. The decision of the district court to treat the inner-city regions as units and to exclude them entirely from the reassignment plan distinguishes this case from *Calhoun v. Cook,* 522 F.2d 717 (5th Cir. 1975), *rehearing denied,* 525 F.2d 1203 (1975). The *Calhoun* court refused, in light of Atlanta's 85 per cent black student population, to order further pupil reassignments even though 92 of the system's 148 schools were over 90 per cent black. However,

On remand, the district court should apply substantially its August 15, 1977, remedial guidelines, 502 F.Supp. 1096, 1134, *supra,* but without regard to the boundary lines of administrative regions. White students should be considered available for reassignment only to the extent exchanging them with pupils from inner-city schools will not render formerly integrated schools identifiably (more than 55 per cent) black. Where practicable, attendance zones should be redrawn across regional lines to include inner-city pupils in integrated schools. Where rezoning is impossible, as we anticipate it will be in most instances, schools with white students available for reassignment should be paired with the closest feasible inner-city school. In order to achieve effective levels of desegregation, it may be necessary to pair several white schools with a single black school. Such pairing should be done with a view toward minimizing the amount of transportation required. In some situations, it may be that the small number of white students available for reassignment from a particular school, coupled with the distance they would have to be transported to reach an inner-city school that can be paired with other white schools, will justify maintaining present assignment patterns.

We emphasize that this remand is not intended to disrupt previously approved assignment patterns. As we said the last time this case was before us, "the steps which [the district court] has taken thus far appear to us to be consistent with the fourteenth amendment." 540 F.2d at 240. The district court's error was its failure to apply its reme-

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there is no indication those 92 identifiably black schools were concentrated in one or several administrative regions left wholly untouched by the pupil reassignment plan. Moreover, if we were convinced that the Fifth Circuit permitted Atlanta's desegregation plan to be limited by intra-district administrative lines, we would be forced to disagree with its decision.

dial guidelines to schools in all the regions. Doing so may well achieve at least some additional desegregation, and it is for this purpose that we are remanding.

Nor are our remand instructions intended to be a straight jacket on the district court. We recognize that the district court must balance a variety of individual and collective interests in an effort to arrive at "a plan that promises realistically to work . . . *now*." *Green v. County School Board,* 391 U.S. 430, 439 (1968). Flexibility is essential to that end.

Our last opinion in this case mirrored our frustration at our inability to chart a course that would guide the district court to desegregate the entire school district:

> We recognize that it would be appropriate for us at this point to supply guidelines to the District Judge as to what he should do under this remand. Omission of such guidelines is not based on any failure to consider the problem in depth. It is based upon the conviction which this court had at the time of its en banc opinion in this case—and for the reasons carefully spelled out therein—that genuine constitutional desegregation can not be accomplished within the school district boundaries of the Detroit School District.
> 540 F.2d at 240.

The district court, however, apparently interpreted the above-quoted comment as a recognition by this court that effective pupil reassignments cannot be achieved in *any* of the schools in the three inner-city regions. *See* 460 F.Supp. at 304. Our comment was not so intended and should not be so read. Although genuine constitutional desegregation may be impossible within the Detroit district, this court has the obligation to see that all practicable steps are taken to remedy the unconstitutional segregation that has been found to exist. To that end, the district court's exclusion of

all schools in Regions 1, 5 and 8 from the pupil reassignment plan is reversed and the cause remanded for further consideration in light of this opinion.

IV

Despite his conclusion that "no more desegregation is feasible in Regions 1, 5 and 8 collectively," 460 F.Supp. at 307, Judge DeMascio determined there are white students in Region 2 available for reassignment to Region 1 schools. 460 F.Supp. at 311-12. Accordingly, he ordered the Detroit Board to prepare a supplemental pupil reassignment plan. The Board argues the district court exceeded its authority by requiring further reassignments. We reject that argument. However, we vacate the court's order and remand the case for a hearing on the question whether Hispanic students should be treated as white for desegregation purposes.

The district court found Region 2 is unique among Detroit's administrative regions in that it has not experienced much growth since 1974 in the percentage of its students who are black. Indeed, the court found, some Region 2 schools had fewer black students in 1977 than in 1974. 460 F.Supp. at 311. Over all, black students accounted for only 62% of the Region's 1977 enrollment. Furthermore, fourteen elementary schools in Region 2 had a total of 2145 white students available for reassignment. Thus, the court concluded, numbers alone pose no obstacle to reassigning Region 2 whites to Region 1 schools. *Id.*

Judge DeMascio apparently felt the concentration in Region 2 of programs of bilingual education for Spanish dominant children accounted for the relatively slow growth of the black enrollment in that Region. We agree with the plaintiffs that restricting bilingual programs to one region

provides Hispanic families not only with neighborhood schools but with an incentive to concentrate in that region. This artificial concentration of Hispanic whites, the district court found, in turn prevents the natural influx of black families and so contributes to resegregation of Region 2. 460 F.Supp. at 312. To counteract this resegregative trend and to comply with the mandate of this court that inner-city schools be desegregated, the district court ordered the Board to develop a plan for reassigning pupils between schools in Regions 1 and 2.

The Detroit Board advances three reasons the district court's order should be overturned. First, the Board says, the Detroit school system is now unitary and the district court had no authority to order further reassignments. Second, even if the system is not yet unitary, reassigning Spanish-dominant students to Region 1 schools will disrupt State required bilingual educational programs while achieving only token integration. Third, the Board says, Hispanic students cannot be treated as white for desegregation purposes. We deal with these arguments seriatim.

The Board's first argument depends on Judge DeMascio's holdings that "the school district no longer discriminates against black students," and that "its present assignment pattern is free from the vestiges of prior discrimination." 460 F.Supp. at 308. The case is therefore controlled by *Pasadena City Board of Education v. Spangler,* 427 U.S. 424 (1976), the Board says. *Pasadena* held a district court has no authority to order annual readjustments of attendance zones to compensate for demographic changes that occur after a racially neutral attendance pattern has been achieved. Since its assignment plan is racially neutral, the Board says, the district court had no authority to order further modification.

The short answer to this argument is that a racially neutral assignment plan does not necessarily achieve a racially neutral attendance pattern. The Board's plan is limited by residential patterns which reflect past discrimination, as well as by district lines and transportation problems. As the Supreme Court recognized in *Swann v. Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 28:

> The objective is to dismantle the dual school system. "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. * * *
>
> In short, an assignment plan is not acceptable simply because it appears to be neutral.

There are now 66,650 students attending schools in Regions 1, 5 and 8. The remedial measures implemented to date afford none of these studnets any relief from de jure segregation. Detroit is still far from achieving a racially neutral attendance pattern. This is not a *Pasadena* situation.[4] *See Adams v. United States, supra,* ..... F.2d ....., slip op. at 36 (the failure of the St. Louis Board ever to adopt a desegregation plan to compensate for segregated residential patterns makes *Pasadena* inapplicable).

The Board's second argument is that reassigning Spanish-dominant students to Region 1 schools will disrupt bilingual

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4. In light of our holding that Detroit has not yet achieved a unitary system, we need not decide whether the concentration of bilingual programs in Region 2 is having a resegregative effect and, if so, whether that fact standing alone would empower the district court to order additional relief. *See Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977) (Dayton I); *Washington v. Davis,* 426 U.S. 229 (1976).

educational programs while achieving only token integration. Dr. Felix Valbuena, the Director of Bilingual Education for the Detroit school district, testified that reassigning Spanish speaking students currently enrolled in Region 2 bilingual programs would impede the Board's ability to develop a model program and train bilingual teachers; produce fear and anxiety for the students; limit community participation and interest in the schools; produce shortages of qualified bilingual teachers and necessary resource materials; and require the Board to adopt less efficient and effective methods of instruction. In return for this disruption, the Board says, only 1600 students will be reassigned, achieving token integration of only five of the thirty-one Region 1 schools.

The Board's concern for the continued viability of its bilingual educational programs is commendable. Circumstances permitting, we might well agree that the desegregative benefits would not justify the disruption created by reassigning Spanish dominant students. Circumstances, however, do not so permit. We agree with the district court that when the choice is between maintaining optimal conditions in a bilingual educational program and desegregating all-black schools, desegregation must prevail. 460 F.Supp. at 312. *See Keyes v. Denver School District No. 1,* 521 F.2d 465, 480 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

This brings us to the Board's third argument, that Hispanic students cannot be reassigned to desegregate identifiably black schools because such students are themselves minorities. In support of this argument, the Board cites *Keyes v. School District No. 1, Denver, Colo., supra,* 413 U.S. 189 (1973).

In the *Keyes* case, the Supreme Court found the school district's history of discrimination against Hispanic stu-

dents justified treating those students as minorities for desegregation purposes:

> We conclude, however, that the District Court erred in separating Negroes and Hispanos for purposes of defining a "segregated" school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment. * * * Indeed, the District Court recognized this in classifying predominantly Hispano schools as "segregated" schools in their own right. But there is also much evidence that in the Southwest Hispanos and Negroes have a great many things in common. The United States Commission on Civil Rights has recently published two Reports on Hispano education in the Southwest. Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians. In fact, the District Court itself recognized that "[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination," 313 F.Supp., at 69. This is agreement that, though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated" schools.
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> (Citations and footnotes omitted.) 413 U.S. at 197-98.

Similarly, the Fifth Circuit has treated Hispanic students as minorities for purposes of school desegregation. *See United States v. Midland Independent School District,* 519 F.2d 60, 63-64 (5th Cir. 1975), *cert. denied,* 424 U.S. 910 (1976); *Tasby v. Estes,* 517 F.2d 92, 106-07 (5th Cir.), *cert. denied,* 423 U.S. 939 (1975) and cases cited therein.

The common element justifying treatment of Hispanic students as minorities in the *Keyes, Midland,* and *Tasby* cases was each school system's history of de jure segregation of Hispanos. In *Keyes,* the Supreme Court found "Negroes and Hispanos in Denver suffer identical discrimination." 413 U.S. at 198. In the *Midland* case, "the record clearly demonstrate[d] that the Midland School District deliberately segregated Mexican-Americans from Anglos." 519 F.2d at 62. The *Tasby* court found record evidence "to establish the isolation of Mexican-American students in the [Dallas school system] and the [Dallas system's] practice of 'integrating' its Mexican-American students with black students." 517 F.2d at 106. Thus, it appears, in school systems that historically have discriminated against Hispanic students, those students must be grouped with blacks rather than whites for desegregation purposes.

Because there is no indication in the record whether, historically, the Detroit school district has discriminated against Hispanic students, we are unable, on the present appeal, to affirm Judge DeMascio's decision that "for school assignment purposes Spanish-surnamed students cannot be treated differently than other white students." 460 F.Supp. at 312. On remand, the district court is directed to conduct a hearing on that issue.

Our remand for a hearing on this issue places the case in an unusual posture. In order for the Board to prevail in its contention that Hispanic students cannot be treated as white, it must prove it practiced de jure segregation of such students. However, doing so would compound the Board's problems because grouping Hispanos with blacks might require revision of the district court's remedial guidelines and a comprehensive review of previously approved assignment patterns, at least in Region 2. This being so, it is

possible that the Board may not continue to assert its present position on remand.

Nor is any other party to the present litigation likely to argue there has been de jure segregation of Hispanic students. The position of plaintiffs in the district court was that concentrating bilingual programs in Region 2 provides neighborhood schools which in turn induce Hispanic families to move there. 460 F.Supp. at 312. The plaintiffs urged that this resegregative effect should be countered by reassigning some Hispanic students to Region 1 schools. Treating Hispanos as blacks for desegregation purposes would, of course, preclude such reassignments since the district court consistently has refused to reassign blacks to indentifiably black schools. Thus, the plaintiffs have no incentive to argue Hispanos have been the victims of de jure segregation in Detroit. Simarily, the State of Michigan defendants, who may well have to share the Board's liability for remedial costs if the court finds de jure segregation of Hispanic students, seem unlikely to present evidence of discrimination.

Because none of the existing parties is likely to argue that Hispanic students have been victims of de jure segregation in Detroit, the district court is directed to permit individuals or organizations representing Detroit's Hispanic community to intervene in the remand proceedings for the limited purpose of presenting evidence on this issue. Our opinion in the related case, No. 78-1598, —F.2d — (6th Cir. 1980), recognizes the right of LULAC Council No. 11054, and its co-appellants to intervene in these remand proceedings solely on the issue of de jure segregation of Hispanos. Should other individuals or organizations also wish to intervene on behalf of the Hispanic community, the district court will determine under Fed. R. Civ. P. 24 whether their interests are adequately represented by

LULAC Council No. 11054 et al.; additional intervenors need not be permitted unless their participation as parties will serve some useful purpose. We emphasize here, as in our opinion in No. 78-1598, that intervention will be limited to the issue of de jure segregation of Hispanic students in the Detroit school system.

Unless the district court finds the defendants discriminated against Hispanic students, it may treat such students as white for desegregation purposes. The court then would be free to order implementation of its previously approved reassignment plan for Hispanic students, or any modification thereof found to be desirable. We suggest, however, that the district court permit LULAC Council No. 11054 et al. to participate as amici curiae in developing a reassignment plan that will achieve the maximum amount of desegregation possible without neglecting the bilingual educational needs of Hispanic students. Before any additional reassignments are implemented, including those contained in the previously approved plan of the district court for transporting Region 2 students to Region 1, they should be tested against the August 15, 1975, guidelines as modified by Part III of this opinion.

Accordingly, the district court's order directing the Board to implement additional pupil reassignments in Regions 1 and 2 is vacated. The cause is remanded for a hearing on the question whether Hispanic students should be treated as white for desegregation purposes and for other action consistent with the outcome of that hearing.

V

The final question we must address is whether Judge DeMascio erred in declining to recuse himself from the remand proceedings in this case. We hold he did not err.

Briefly, the plaintiffs argue Judge DeMascio violated 28 U.S.C. § 455(a) and Canon 3A(4) of the Code of Judicial Conduct by engaging in various *ex parte* contacts and discussions with court-appointed experts, community groups and representatives of the Detroit Board. In an opinion reported at 426 F.Supp. 929 (E.D. Mich. 1977), Judge DeMascio denied plaintiffs' motion for recusal.

28 U.S.C. § 455(a), as amended,[5] provides:

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5. Section 455 was amended by the Act of December 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609. Section 1 of that Act substituted the present subsection (a) for the former version which read:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

There is agreement among the courts that the purpose of the amendment was to change the standard for recusal from a subjective to an objective one, as well as to overrule the prior concept that close cases involving disqualification should be resolved against recusal on the ground the judge has a duty to sit. *See e.g., United States v. Cowden,* 545 F.2d 257 (1st Cir. 1976), *cert. denied,* 430 U.S. 909 (1977); *Davis v. Board of School Commissioners of Mobile County,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976).

There is a split among the circuits, however, as to whether the amended version of § 455(a), with its objective standard, applies to post amendment proceedings in cases, such as this one, filed before the amendment's effective date. Section 3 of the amending act provided the amended version "shall not apply to the trial of any proceeding commenced prior to [Dec. 5, 1974] nor to appellate review of any proceeding which was fully submitted to the reviewing court prior to [that date]." The Fourth and Eighth Circuits have held the amended version inapplicable to post amendment proceedings in cases filed before December 5, 1974. *In re Virginia Electric & Power Co.,* 539 F.2d 357 (4th Cir. 1976); *United States v. Dodge,* 538 F.2d 770 (8th Cir. 1976), *cert. denied,* 429 U.S. 1099 (1977). The Fifth Circuit has disagreed. *Potashnick v. Port City Construction Co.,* ..... F.2d ....., 48 U.S.L.W. 2490 (5th Cir. Jan. 15, 1980); *Parrish v. Board of Commissioners of Alabama State Bar,* 524 F.2d 98 (5th Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1977). Judge DeMascio held the amended version of § 455(a) inapplicable in the present case. 426 F.Supp. at 932.

§ 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The plaintiffs complain that Judge DeMascio created the appearance of partiality by meeting *ex parte* with the Detroit Board's representatives on August 15, 1975, even before plaintiffs' counsel had received a copy of the court's just filed remedial guidelines, to discuss an impending teachers' strike. The plaintiffs also argue Judge DeMascio engaged in what they term "negotiations" with the Board in developing a desegregation plan, a process from which they were excluded.

Judge DeMascio's opinion denying recusal discusses these complaints and his underlying actions in detail, and we need not recount them here. *See* 426 F.Supp. at 935-39. He characterized the incidents of which plaintiffs complain as "judicial activities designed to ensure a community climate receptive to the court's orders." 426 F.Supp. at 939. The so-called negotiation process was designed "to avoid the formality of an order," he said. *Id.* Concluding that his actions were "well within [his] discretion and based on substantial precedent." Judge DeMascio held § 455(a) did not require recusal. *Id.*

We agree. Although perhaps a bit unorthodox, Judge DeMascio's actions appear to us to have been judicial activities. To make out a case for recusal under § 455(a), a movant must rely on extra-judicial conduct rather than

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Because we think the actions of Judge DeMascio do not require recusal even under the section as amended, we need not decide which version applies to this case. Rather, we assume for purposes of this decision that the amended version of the statute applies.

matters arising in a judicial context. *Davis v. Board of School Commissioners of Mobile County, supra,* 517 F.2d at 1052 (construing amended § 455(a) *in pari materia* with 28 U.S.C. § 144, the other federal disqualification statute). *See United States v. Grinnell Corp.,* 384 U.S. 563, 583 (1966); *Berger v. United States,* 255 U.S. 21, 31 (1921). Accordingly, we affirm Judge DeMascio's decision that recusal was not required.

The plaintiffs also complain that Judge DeMascio's conduct violated Canon 3A(4) of the Code of Judicial Conduct:

> (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex-parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

In addition to his previously described meeting with Board representatives and "negotiations" over the Board's proposed desegregation plans, the plaintiffs argue, Judge DeMascio's use of experts violated Canon 3A(4). By order of April 15, 1975, Judge DeMascio appointed three educators as experts to assist him in gathering background information, soliciting the views of community groups and educators, and evaluating the Educational Components of the Board's remedial plan. The plaintiffs do not question the court's authority to utilize experts. Rather, they complain the court's experts did not file reports of record and

were never subject to cross-examination, but submitted their views *ex parte*.

We do not believe Judge DeMascio's use of experts, or his receipt through them of community and expert views on how best to approach the problems of desegregating Detroit schools, required recusal. We are concerned with the plaintiffs' charge that the reports of these experts were not placed in the record nor made available to the parties. Accordingly, we expressly direct that if any experts are employed to advise the district court of any further matters in this litigation, they shall prepare written reports, copies of which shall become part of the record and shall be made available to all parties or their attorneys.

The remedial phase of this litigation has been protracted and arduous. We recognized in a previous opinion that "District Judge DeMascio was faced with an extremely difficult (if not impossible) assignment, confronted as he was with the responsibility of formulating a decree which would eliminate the unconstitutional segregation found to exist in the Detroit public schools, without transgressing the limits established by the Supreme Court." 540 F.2d at 236. Our review of Judge DeMascio's various opinions and orders inclines us not to disagree with District Judge James P. Churchill's assessment[6] of Judge DeMascio's conduct in these remedial proceedings:

> It is my opinion that the manner in which Judge Robert E. DeMascio has presided in this case has been exemplary and should command the respect of the parties, counsel, the judiciary, and the public.
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> 426 F.Supp. at 944.

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6. Judge Churchill's comment is taken from his opinion holding, on a question referred to him by the Chief Judge of the district, that Judge DeMascio's conduct had not created the appearance of partiality and so did not require recusal in regard to faculty assignments.

However, in view of the public interest in the instant school desegregation case, the challenge raised by the plaintiffs, and the bitter feelings that have developed, this court suggests that, on remand, the Chief Judge of the District Court for the Eastern District of Michigan reassign this case either to himself or to another appropriate judge.

VI

It was indicated during oral argument that plaintiffs intend to proceed with their efforts to establish, within the guidelines enunciated by the Supreme Court in *Milliken v. Bradley,* 418 U.S. 717, 744-47 (1974) (*Milliken* I), a basis for a metropolitan remedy. *See* 540 F.2d at 240; 411 F. Supp. at 937. Our limited affirmances in *Bradley v. Milliken,* 540 F.2d 229 (6th Cir. 1976) and the present appeal are without prejudice to the district court's obligation to proceed with the interdistrict litigation, if pursued by the plaintiffs.

On remand, the district court will be empowered to make further alterations in its previously approved remedial plans, as the evidence may require.

The case is remanded to the district court for further proceedings not inconsistent with this opinion and our previous opinion reported at 540 F.2d 229. No costs are taxed. Each party will bear its own costs on this appeal.

80-31
80-48

No. 80-104

FILED

AUG 25 1980

MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

October Term, 1980

DETROIT BOARD OF EDUCATION, et al., WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,

and

LULAC COUNCIL, No. 11054, et al.,

Petitioners,

vs.

RONALD BRADLEY, et al.,

Respondents.

PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO CERTIORARI

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Questions Presented

1. Did the Court of Appeals err in reversing as contrary to the law of the case a district court finding that shifting demographic changes had obliterated any obligation of the school officials to remedy the present effects of the adjudicated prior *de jure* violations?

2. Did the Court of Appeals err in vacating and remanding for further hearing a district court reassignment plan premised on the assumption that Hispanics could permissibly be treated as white for desegregation purposes?

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IN THE

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DETROIT BOARD OF EDUCATION, et al., WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al.,

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LULAC COUNCIL, No. 11054, et al.,

Petitioners,

vs.

RONALD BRADLEY, et al.,

Respondents.

PLAINTIFFS' CONSOLIDATED BRIEF IN OPPOSITION TO CERTIORARI

Introduction

Plaintiffs, herein, submit this Consolidated Brief in response to the petitions for certiorari heretofore filed by the Detroit Board of Education, the State Defendants, and the Hispanic Intervenors.

The Detroit Board bases it petition on assumptions that the Court of Appeals: violated the teachings of this Court in *Pasadena*[1] by assertedly ignoring racial segregation caused by forces of demography over which the school offi-

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[1] *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

cials had no control; violated the teachings of *Swann*[2] and its progeny by requiring that some statistical racial balance be achieved; impermissibly took into account residential segregation in measuring the sufficiency of a student assignment plan; improperly ordered on remand a trial to determine whether Hispanics had been the victims of past *de jure* segregation as a predicate for determining whether or not Hispanics in Detroit could permissibly be treated as "white" for desegregation purposes; departed from precedents established in the Fourth and Fifth Circuit for determining requisite degrees of permissible desegregation in a predominantly black school district.

The State Defendants present in their petition the argument that the Court of Appeals transgressed *Milliken I* and its teachings on the predicates for inter-district liability findings.[3]

The LULAC Intervenors challenge a decision by the Court of Appeals affirming a district court denial of intervention to protect bilingual education programs.

Plaintiffs-Respondents argue herein that the Court of Appeals properly reversed district court findings which declared that shifting demographic patterns obliterated any present effects of past *de jure* conduct by school officials and thereby obviated the need for remediation within the bounds of feasibility. We also argue that the Court of Appeals properly applied this Court's earlier teachings in finding that the *de jure* actions of the state and local officials produced not only segregated schools but also contributed to residential segregation which itself had a reciprocal effect on the schools and the school district. We argue that

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[2] *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

[3] *Milliken* v. *Bradley (Milliken I)*, 418 U.S. 717 (1974).

the Court of Appeals properly affirmed the denial of intervention sought by the LULAC petitioners, that the amicus status accorded by the Court of Appeals will more than adequately protect any legitimate rights at this stage of the litigation and in light of the positions taken by the parties, and that the Court of Appeals did not err in remanding this matter for further proceedings on the issue of how Hispanic students should be classified for desegregation purposes in the remedial phase of this law suit.

Respondents are of the view that the matters sought to be reviewed are not in a posture which justifies review, and that in this regard the case is in a posture similar to that of the *Dallas* school case when it was similarly remanded by the Fifth Circuit.[4] The Court of Appeals decisions being challenged merely held the district court to the previous law of the case in measuring the adequacy of remedial

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[4] *Estes* v. *Metropolitan Branches of Dallas NAACP*, 48 U.S.L.W. 4118 (1980). In this case, the Fifth Circuit had remanded for further proceedings a district court desegregation plan which totally excluded an entire area of the Dallas school district, an area comprised almost wholly of one-race black schools. The Fifth Circuit concluded that it could not review such a desegregation plan in the absence of the type justification for these one-race schools this Court's *Swann* decision had indicated was necessary. It, therefore, remanded the case for the district court to either provide explanations for each one-race school to be left excluded or to develop a plan for student desegregation which included these schools. *Metropolitan Branches of Dallas NAACP* v. *Estes*, 572 F. 2d 1010 (1978). This Court accepted the petition for certiorari submitted by the Dallas school board, received briefs, heard oral arguments, then dismissed the Writ as improvidently granted. As the Court of Appeals concluded in the Fifth Circuit, the Sixth Circuit Court of Appeals also concluded that the district court plan had impermissibly or inexplicably excluded from desegregation the very schools which had borne the brunt of the prior *de jure* conduct, and remanded for further proceedings. As argued in the Dallas case, we will argue below that this Court should not accept for review a case in this posture, since the record is not fully developed and will not be until after the district court has obeyed the remand from the Court of Appeals.

orders, and rejected efforts by the district court to change the facts to fit remedial conclusions otherwise arrived at. The Court of Appeals, far from adhering to any rigid formula of racial balance, took due note of the "practicalities of the situation" [5] in remanding a plan for desegregation which, as an *a priori* matter, excluded the black central core regions in Detroit from participation in a desegregation plan. We urge this Court to deny each and every one of the petitions for certiorari, and to permit the experienced Court of Appeals below to complete the sensitive task of supervising the formulation of desegregation remedies which "promise realistically to work . . . now",[6] and which match the remedy to the past adjudicated violations in accordance with this Court's holdings in *Swann* and *Milliken I*.[7]

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[5] *Davis* v. *Bd. of School Commissioners of Mobile Co.*, 402 U.S. 33 (1971). In its previous remand decision, 540 F.2d at 238, the Sixth Circuit cited *Davis* in support of the impermissibility of treating as isolated such integral parts of the Detroit system as Regions 1, 5 and 8. The district court has been instructed to apply its August, 1977 remedial guidelines to the *entire* district, including Regions 1, 5 and 8.

It is thus clear that the Sixth Circuit's remand contemplated desegregation for regions 1, 5, and 8 no less meaningful than that originally approved for regions 2, 3, 4, 6 and 7. The Detroit defendants are plainly wrong when, at pages 23-24, they accuse the Court of Appeals of pursuing "token integration or specific racial ratios." It was the Detroit Board of Education's 1975 remedial proposal which first provided the inducement for the district court's impermissible exclusion of regions 1, 5 and 8 and resulting inadequate, or token, elimination of "the condition which offends the constitution."

[6] *Green* v. *School Board of New Kent County*, 391 U.S. 430 (1968).

[7] Both the Detroit and State defendants are quick to cite *Milliken I* for the proposition that the scope of the remedy cannot *exceed* the scope of the violation. (See, e.g., State brief at pp. 4-11; Detroit brief at pp. 19, 20, 21, 25, 26). These defendants ignore the corollary—the scope of the remedy must *equal* in its sweep the scope of the violation. Similar language on this point is to be

Statement

A. *Prior Proceedings Before This Court*

This case has already been before this Court on two previous occasions. On the first occasion, this Court held that the lower courts did not have adequate record basis for ordering the inclusion, for remedial purposes, of suburban school districts which had not been found liable for past *de jure* conduct, even though the liability of the Detroit and State officials for the *de jure* segregation within the Detroit Public School System had been established.[8]

On the second occasion, this Court affirmed the lower courts in holding that the state defendants, having been adjudicated as jointly liable with the local officials for the *de jure* segregation in the Detroit public schools, could permissibly be required to help pay for ancillary educational components necessary to remedy the continuing vestiges of the prior illegal conduct.[9]

B. *The* Milliken I *Remand: Phase One*

After the first remand, the district court undertook to develop a remedial plan limited to Detroit, in pursuit of which lengthy hearings were held from April-July 1975.[10]

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found in both *Swann*, 402 U.S. at 16 and *Milliken I*, 418 U.S. at 738 and simply underscore this Court's insistence that a federal court sitting in equity do complete relief, and restore the victims of the unconstitutional behavior to the position they would have occupied in the absence of the illegal conduct of the public officials. Also see, *Dayton Board* v. *Brinkman (Dayton I)*, 433 U.S. 406 (1977).

[8] See *Milliken I*, at pages 752-753.

[9] *Milliken* v. *Bradley (Milliken II)*, 433 U.S. 267 (1977).

[10] During the remand remedy hearings on the intra-district plan, proposed desegregation plans were submitted by the State and Detroit defendants, as well as by plaintiffs. The State Plan was,

On August 28, 1975, the district court entered its remedial opinion, ordering that five of the eight administrative regions in Detroit participate in desegregation, but finding that three of the regions were too black to be included in the remedy.[11] The district court also entered, in November, 1975, a faculty reassignment order, even though it had denied Plaintiffs an opportunity to present proofs on the magnitude of faculty segregation.[12] Plaintiffs appealed from the district court's remedial plan as to both students and faculty. The challenge to the student reassignment plan was based on Plaintiff's belief that the district court had excluded from the remedy those very parts of the public school system which had been most directly and visibly impacted by the prior *de jure* conduct of the defendants. The challenge to the faculty reassignment order was that it, being based on an evidentiary void caused by erroneous district court rulings during the remedy trial, failed adequately to address or redress the magnitude of faculty segregation existent in the school district and ignored the students' entitlement to non-segregated faculties without regard to prior findings on faculty liability.[13]

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essentially, silent on student reassignment, the Detroit Plan proposed to exclude the three blackest regions—regions 1, 5, and 8—from any student reassignment participation. The plan submitted by the Plaintiffs demonstrated how each of the eight internal administrative subdivisions of the Detroit public school system could be feasibly included within a desegregation plan.

[11] *Bradley* v. *Milliken*, 402 F. Supp. 1096 (Eastern District Michigan 1975).

[12] *Bradley* v. *Milliken*, 411 F. Supp. 943 (Eastern District Michigan 1975).

[13] This Court and other federal courts have repeatedly held that once *de jure* discrimination has been proven against public school officials, the students are entitled to a unitary system which includes not only unsegregated school buildings, but also non-segregated teaching faculties and other staffs.

The Court of Appeals agreed with the concern of the Plaintiffs, reversing the district court's establishing of *a priori* limitations on the amount of desegregation permissible and rejecting the district court's conclusion that the core Detroit regions could be excluded from the desegregation remedy without justifying findings on infeasibility.[14] The Court of Appeals also reversed the district court's conclusion that it was without authority to fully remediate known faculty segregation. The district court was directed to conduct a remand proceeding, and to permit Plaintiffs to present their proofs on faculty segregation and the need for remedial action, and to require the Detroit defendants to justify the exclusion of regions 1, 5 and 8 or effect their inclusion to the extent feasible.[15]

C. Milliken I *Remand: Phase Two*

On remand, the district court received additional proofs from the Detroit defendants, almost all of which was designed to argue that demographic shifts had resulted in a student enrollment which was predominantly black in the district, and almost totally black in the three regions previously excluded by the district court.[16] The defendants also argued that these demographic shifts had eliminated any present effects of the past *de jure* violations, and that it was not possible to say that the schools in regions 1, 5 and 8 were one-race because of past *de jure* conduct, since the demographic shifts would have made them black even

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[14] *Bradley* v. *Milliken*, 540 F.2d 229, 237-240 (6th Cir., 1976).

[15] On remand the district court entered, after hearings, a faculty desegregation order which is in place and was not before the 6th Circuit.

[16] At the time of the remand from the 1976 Order of the Court of Appeals, the Detroit public schools had a student enrollment which was 85% black. See, Detroit Petition Appendix (Pet. App.) at page 46a.

in the absence of the *de jure* conduct. The defendants asked to be relieved of the necessity of any further student desegregation.

The district court entered its opinion after the remand proceedings, finding as a matter of law that the defendants had carried their burden of proving that the one-race schools in 1, 5 and 8 were not the product of past *de jure* conduct. The district court concluded, however, that the District had failed adequately to include schools in region 2 as a part of the desegregation plan, a failure the district court attributed to the defendants' desire to avoid involving Hispanic students whose bilingual programs it was asserted might otherwise be disrupted.[17] The district court firmly rejected this basis for excluding the region 2 schools, declared that for purposes of Detroit desegregation Hispanics should be treated as white, and ordered the development of a plan which would pair schools from region 2 with the one-race black schools in region 1.[18] From this district court order appeals were taken by both defendants and plaintiffs: the defendants arguing that the district court had erred in requiring any further desegregation and by labeling Hispanics as white; plaintiffs arguing that the district court's conclusion about the absence of present effects from the prior violations was in error and contrary to the law of the case.[19] Also appealing the district court

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[17] Ibid, at page 59a.

[18] Ibid, at pages 76a-77a.

[19] In our brief to the Court of Appeals, at page 29, we pointed out that this Court had directed "prompt formulation of a decree directed to eliminating the segregation found to exist in Detroit city schools, a remedy which has been delayed since 1970." *Milliken I*, 418 U.S. at 753. We also pointed out, at page 30, that the Court of Appeals in its earlier reversal and remand had held that the three excluded regions, 1, 5, and 8, were "in the area most affected by the acts of *de jure* segregation of which both the Detroit and State Defendants have been found guilty." *Bradley* v. *Milliken*, 540 F.2d at 238. The remand by the Court of Appeals was

decision were parties representing Hispanic students, whose earlier attempt to intervene had been rejected by the district court, an intervention prompted by district court remarks during the remand proceedings about the nature and status of the bilingual programs in region 2.[20]

The matters appealed, including plaintiffs' appeal from an earlier district court denial of a motion to recuse,[21] were

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explicit in rejecting the "erroneous theory . . . that the mere elimination of identifiably white schools satisfies the criteria of *Brown*." 540 F.2d at 239. The Court of Appeals remanded in language too clear to be mistaken, saying that its action was taken to "remand the case for further consideration in regard to the three central regions of the City of Detroit which both the school board and the District Judge excluded from their proposed remedial plans. We cannot hold that where unconstitutional segregation has been found, a plan can be permitted to stand which fails to deal with the three regions where the majority of most identifiably black schools are located." 540 F2.d at 240.

[20] For discussion of the circumstances prompting the attempt at intervention by parties representing Hispanic students, see LULAC brief at pages 2-4. Unless otherwise indicated, all references to the Petition Appendix (Pet. App.) will refer to the Appendix annexed to the Detroit brief. References to the briefs of the petitioners will so indicate.

[21] By an order of April 15, 1975, explained at 402 F. Supp. at 1104, the district court appointed three experts to assist it in reviewing and evaluating the remedial plans presented as a result of the *Milliken I* remand for intra-district relief. The circumstances surrounding the court's use of these experts and other conduct on the part of the district court, prompted Plaintiffs to file a motion seeking the disqualification of the district court Judge. Plaintiffs' motion for recusal was denied by the District Judge, 426 F. Supp. 929 (1977). Since an order denying a motion for disqualification is neither final nor appealable, see e.g., *Kelly* v. *Metropolitan County Board of Education*, 479 F. 2d 810, 811, note 1 (6th Cir. 1973), and cases there cited, the orders denying recusal did not become appealable until the district court entered its amended Judgment of November 17, 1978. Federal Rules Civil Procedure 54 (b); also see *Oliver* v. *Michigan State Board of Education*, 508 F. 2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). In its April 14, 1980 Opinion, the Court of Appeals affirmed the district court's denial of our motion to recuse. That matter is not before this Court in these petitions.

all consolidated for briefing and argument before the Sixth Circuit.

D. Milliken I *Remand: Phase Three*

The Court of Appeals, based on its independent review of the record evidence and long experience with the facts of this case,[22] reversed the district court conclusion that there were no present effects from the prior *de jure* violations;[23] reversed the conclusion that shifting demographic patterns could constitute a defense against such further desegregation as was feasible on the record without undermining a viable desegregation plan;[24] rejected the district court attempt to treat Detroit's administrative regions as inviolable for purposes of desegregation;[25] affirmed the district court denial of intervention to the Hispanic representatives;[26] vacated the district court conclusion that Hispanics could be treated as white in Detroit's desegregation plan;[27] affirmed the district court's denial of plaintiffs' motion to recuse;[28] and remanded, with instructions that the Hispanic parties were to be granted intervention rights to litigate the issue of whether the school officials had committed *de jure* violations against Hispanics such as to justify treating Hispanics as minorities for desegregation pur-

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[22] This long-running school desegregation case has been before the Sixth Circuit on several occasions: in 1970, as reported at 433 F. 2d 897; in 1971, as reported at 438 F. 2d 945; in 1973, as reported at 484 F. 2d 215; in 1976, as reported at 540 F. 2d 229; and in 1980, as reported in the Slip Opinion of April 14, 1980, the Opinion which gives rise to the present petitions before this Court.

[23] Pet. App., at page 13a.

[24] Ibid at page 13a.

[25] Ibid at pages 15a-19a.

[26] LULAC Appendix, at pages 6-9.

[27] Pet. App. at pages 19a-24a.

[28] Ibid at pages 26a-29a.

poses;[29] and, further directed that the district court was to disregard the internal administrative subdistrict lines in its further effort to involve, to the extent feasible, additional students from regions 1, 5 and 8 in the desegregation remedy.[30] It is this series of actions by the Court of Appeals which form the basis for the three petitions for certiorari which are now before this Court.

REASONS FOR DENYING THE WRITS SOUGHT

I.

The Court of Appeals Properly Rejected and Reversed, as Contrary to the Law of the Case and Other Applicable and Controlling Legal Principles, District Court Conclusions That Subsequent Demographic Shifts Rendered Present Segregation Irremediable and Obliterated All Vestiges of the Prior *De Jure* Conduct.

A. *The Present Segregation Flowed From the Prior* De Jure *Conduct Rather Than Solely From Demographic Shifts*

Contrary to the distorted and inaccurate assertion by the Detroit defendants that "The predicate for this reversal was a *sua sponte* 'finding' by the Sixth Circuit *de hors* the record that all population shifts and all private housing decisions are 'vestiges' of prior school segregation by the defendants",[31] the Court of Appeals grounded its action on the settled law of the case as it has unfolded over more than 10 years of extensive litigation. The Court of Appeals held that "the record demonstrates that *these* population

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[29] Ibid at pages 24a-26a.

[30] Ibid at pages 16a-17a.

[31] Detroit Brief at page 11.

changes themselves are *in part* vestiges of discrimination." [32] (emphasis added) The Court of Appeals does not attempt to attribute *all* population shifts or *any* private housing decisions to the prior *de jure* discrimination by the defendants. Rather, it cited the earlier findings by Judge Roth for the proposition that the school officials had deliberately exploited and incorporated known residential segregation as a part of their intentional efforts to separate students on the basis of race,[33] and agreed with this Court's teachings in *Swann* and *Keyes* that deliberate segregative actions by school officials have clear and frequently profound reciprocal effects on the racial composition of surrounding residential areas.[34]

B. *The Sixth Circuit Rulings Are In Harmony With Other Circuits*

Whatever might have been the meaning or reason for the findings and conclusions in the Fourth and Fifth Circuits in dealing with, respectively, Richmond[35] and Atlanta[36] desegregation, the law of this case conclusively establishes that the racial segregation in the Detroit public schools was the product of the actions of the public officials, and not demographic factors such as population shifts. Thus, the effort of the Detroit defendants to rely upon the language or reasoning in those two cases sheds no light on the instant matters which faced the Court of Appeals initially, and this

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[32] Pet. App. at 13a.

[33] *Bradley* v. *Milliken*, 338 F. Supp. at 587, 593. Also see 484 F. 2d at 242.

[34] See, particularly, Pet. App. at pages 8a-13a.

[35] *Bradley* v. *School Board of the City of Richmond*, 462 F. 2d 1058 (4th Cir. 1972) *aff'd by equally divided Court*, 412 U.S. 92 (1972).

[36] *Calhoun* v. *Cook*, 522 F. 2d 717 (5th Cir. 1975), *reh. den.* 525 F. 2d 1203 (5th Cir. 1975).

Court now.[37] In any event, the Court of Appeals specifically considered and rejected as inapplicable the Fifth Circuit decision in the Atlanta case.[38] The Court of Appeals rejected as inapplicable the Atlanta decision, in part, because of substantially different factual background.[39]

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[37] It is important to note that the Court of Appeals for the Sixth Circuit has been required to review on two separate occasions the efforts of both the Detroit defendants and the district court to relitigate the liability findings of this case as justification for excluding regions 1, 5 and 8. When this matter was on appeal before the Sixth Circuit in 1976, the inapplicability of the Fourth Circuit holdings in the Richmond case were explicitly discussed, 540 F. 2d at 235, n. 3, at least in part because the Fourth Circuit found and held that Richmond had achieved unitary status under the prior desegregation orders and no further jurisdiction existed to consider and order the metropolitan remedy then at issue. See, 462 F. 2d at 1069. Neither in 1976 nor in the present matters when they were before the Sixth Circuit were inter-district remedies at issue.

[38] Pet. App. at page 17a, n. 3. The Sixth Circuit makes clear that the Atlanta case is distinguished from the Detroit case because of the "decision of the district court (in Detroit) to treat the inner-city regions as units and to exclude them entirely from the reassignment plan . . ." It noted that there was "no indication those 62 identifiably black schools (in Atlanta) were concentrated in one or several administrative regions left wholly untouched by the pupil reassignment plan. Moreover, if we were convinced that the Fifth Circuit permitted Atlanta's desegregation plan to be limited by intra-district administrative lines, we would be forced to disagree with its decision."

[39] The Fifth Circuit affirmance of the district court was, in part, based on its refusal to hold as clearly erroneous the district court findings that Atlanta had achieved unitary status and had eliminated the vestiges of its racially discriminatory past actions. See, 522 F. 2d at 719, 720. It is thus clear that both Richmond and Atlanta were viewed by their respective Courts of Appeals as having achieved that status this Court's *Pasadena* decision held deprived federal courts of further jurisdiction to require remedial action. In the instant matter, the Sixth Circuit, in language too clear to be mistaken, has held that the vestiges of prior *de jure* discrimination have yet to be extirpated in Detroit. This Court's *Milliken II* decision is further proof that the effort to exorcise unconstitutional vestiges in Detroit continued beyond the initial 1975 desegregation order of the district court: yet it is precisely that reassignment plan the Detroit defendants would have this Court cast in constitutional concrete as dispositive of all adjudicated liabilities.

C. *The Sixth Circuit Rulings Comport With This Court's* Milliken I *and* Pasadena *Decisions*

The arguments of the Detroit and State defendants that either *Pasadena* or *Milliken I*[40] have controlling impact on the issues before the Court of Appeals are without merit. This Court's decision in *Pasadena* made clear the factual circumstances in which that case was decided: "All that is now before us are the questions of whether the district court was correct in denying relief when petitioners sought to modify the 'no-majority' requirement as then interpreted by the District Court."[41] The key factual question in *Pasadena* was whether, in a school district which had admittedly achieved the desegregation standards set by the courts, subsequent population shifts with no proven relationship to conduct by the school officials would provide the predicate for annual corrections in the racial composition of the public schools. In short, in *Pasadena* unitary status had been achieved but was later threatened by other intervening factors. In Detroit, unitary status has never even been approximated, much less achieved, and the Court of Appeals action must be seen as part of the as yet incomplete effort to eliminate the fact and vestiges of the adjudicated dual system.[42]

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[40] The Detroit Brief, at pages 11, 19 (n. 17), 25-26, argue the applicability of *Pasadena* to the totally different factual circumstances of this case. At pages 17ff this Court's *Milliken I* interdistrict holdings are urged as having some inexplicable applicability to these intra-district proceedings.

[41] *Pasadena,* op. cit., at p. 432.

[42] See, *Pasadena,* at p. 436, where this Court noted that the population shifts sought to be corrected for by the district court were not "attributed to any segregative actions on the part of the (Pasadena school board) petitioners . . ."; *compare* with the language of the Sixth Circuit which held that "the record demonstrates that *these* population changes themselves are in part *vestiges of past discrimination*" (emphasis added), at Pet. App. 13a.

In *Milliken I* this Court did not even address the question of unitary status, and affirmed the lower courts in finding explicit *de jure* conduct which had created the dual system of black and white schools.[43] Thus, to the extent this Court addressed intra-district issues, it was to support the determinations of the lower court that systemwide relief was necessary to remedy the systemwide impact of the explicit public discrimination and segregation.[44] Nor can the defendants take solace from this Court's treatment of the inter-district issues raised in *Milliken I*, since no inter-district issues were before the Court of Appeals on direct appeal, and none were decided by it in the April 14, 1980 opinion and orders which form the bases for the petitions before this Court. While correctly noting this Court's affirmance of lower court findings of *de jure* conduct, the Detroit defendants omit reference to and disregard the impact of the systemwide effects these violations were found to have had.[45] The Court of Appeals made clear that its reversal

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[43] "Although the list of issues presented for review . . . do not include argument on the findings of segregative violations on the part of the Detroit defendants two of the petitioners argue in brief that these findings constitute error . . . [U]nder our decision last Term in *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973) the findings appear to be correct." 418 U.S. at 738, n. 18. This Court also held that "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district." 418 U.S. at 746.

[44] As Justice Stewart's concurring opinion in *Milliken I* stated, "Within a single school district whose officials have been shown to have engaged in unconstitutional racial segregation, a remedial decree that affects every individual school may be dictated by 'common sense' . . . and indeed may provide the only effective means to eliminate segregation 'root and branch' . . . and to 'effectuate a transition to a racially nondiscriminatory school system . . .'" 418 U.S. at 754-755; and "The record here does support the claim made by the respondents that white and Negro students within Detroit who otherwise would have attended school together were separated by acts of the State or its subdivision." 418 U.S. at 756, n. 2.

[45] See, for instance, Detroit brief at note 13, and 418 U.S. at 725-27. As the district court, Sixth Circuit and this Court have

and remand was for the explicit purpose of seeing to it that the scope of the remedy fit the scope of the systemwide violation which had been found and never corrected.[46]

The State defendants argue that the Court of Appeals erroneously attributed the school segregation within the Detroit public schools to the reciprocal impact of school and housing segregation and discrimination both within Detroit and between Detroit and the surrounding communities.[47] Specifically, the State Defendants argue that the Court of Appeals disregarded and did violence to this Court's *Milliken I* findings.[48] Yet, the Court of Appeals merely applied the previous findings by the district court, the Court of Appeals and this Court in this case, in finding that the district court erred when it said that[49]

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each noted, where the impact of the *de jure* segregative acts of the public officials has been systemwide in scope, it is only "common sense" to require a remedy equally as pervasive. *Keyes*, 413 U.S. at 203.

[46] In its April 14, 1980 decision remanding this case to the district court for further proceedings, the Court of Appeals emphasized that "This Court has recognized from the first that some one-race schools are unavoidable under a Detroit-only plan. See 540 F. 2d at 237; 484 F. 2d at 249." Pet. App. at pages 16a-17a. Again the Court noted "In some situations, it may be that the small number of white students available for reassignment from a particular school, coupled with the distance they would have to be transported to reach an inner-city school that can be paired with other white schools, will justify maintaining present assignment patterns. We emphasize that this remand is not intended to disrupt previously-approved assignment patterns." Pet. App. at page 18a. And, "although genuine constitutional desegregation may be impossible within the Detroit district, this Court has the obligation to see that all practical steps are taken to remedy the unconstitutional segregation that has been found to exist." Pet. App. at 19a.

[47] See State brief, pages 4ff.

[48] State brief at pages 4-8.

[49] Pet. App. at 50a.

> "The demographic data presented . . . compels us to further conclude that it is the demographic residential patterns, operating independently of school assignments, together with the predominance of blacks in the school system, and not the segregative acts of the Detroit Board and the state that have resulted in the one race schools that remain in regions 1, 5 and 8."

and that:[50]

> "These pronounced demographic shifts . . . and the predominance of the black student population have obliterated the optional and gerrymandered attendance zones which permitted white students to avoid attending integrated schools, the practice of busing black students from overcrowded schools beyond a closer white school and the practice of altering feeder patterns in racially changing neighborhoods."

The Court of Appeals noted Judge Roth's original finding that the school officials had knowingly and deliberately exploited the residential segregation created by the actions of public and private agencies and persons to carry out their own policies of school segregation:[51]

> "When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, including the school authorities, are, in part, responsible for the segregated condition that exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of schools."

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[50] Ibid at 49a.

[51] Ibid at 88a.

The Court of Appeals then noted its language in affirming Judge Roth's findings of *de jure* violations within Detroit:[52]

> "In affirming the District Judge's findings of constitutional violations by the Detroit Board of Education and by the State Defendants resulting in segregated schools in Detroit, we have not relied at all upon testimony pertaining to segregated housing except as school construction programs helped cause or maintain such segregation."

The Court of Appeals pointed out in its April, 1980 opinion that Judge Roth's findings "that present Detroit housing patterns reflect the Board's past discrimination" accords with the analysis of the Supreme Court in *Swann* and *Keyes*.[53]

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[52] Ibid at 10a.

[53] In *Swann, op. cit.*, this Court held:

> "The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system . . . Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns, which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy." 402 U.S. at 20-21.

Two years later, in *Keyes, op. cit.*, this Court held:

> "So, also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of marking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools." 413 U.S. at 201.

The Court of Appeals rejected both the District Court's demographic conclusions and the Detroit Board's arguments in support of those conclusions with this language:[54]

> "Viewed in this light, Judge DeMascio's holding, urged by the (Detroit) Board before this Court, is that the segregative effects of the defendants' discriminatory policies have been obliterated by the very demographic changes those policies helped to produce. We conclude that this argument refutes itself. It is the law of this case that the unconstitutional actions of defendants, both local and state, contributed to the segregated residential patterns and the one-race schools that now exist in Detroit. Judge Roth found that *de jure* school segregation encouraged whites to flee from racially changing neighborhoods and ultimately from the Detroit school district. That finding is supported by substantial record evidence. . . ."

Fearful of yet being found liable for inter-district *de jure* acts which might form the predicate for inter-district relief, the State defendants argue that

> ". . . the Court of Appeals has completely disregarded this Court's holding and concluded that past *de jure* school districts which, in turn, produced a current conresidential concentration of blacks within Detroit and a present residential concentration of whites in other school districts whcih, in turn, produced a current condition of school segregation . . . [T]he Circuit Court completely ignored this Court's prior ruling in the case and applied a theory which can only lead to multidistrict racial balancing."[55]

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[54] Pet. App. at 13a.

[55] State brief at page 8.

But the Court of Appeals has simply held to this Court's *Swann* and *Milliken I* teachings that the scope of the remedy must fit the scope of the violation, teachings reaffirmed in *Dayton I, Columbus* and *Dayton II,* as well as in *Milliken II.*[56] The State defendants cannot now be heard to complain that the present effects of the prior adjudicated violations should be disregarded by a federal court sitting in equity, even though fashioning the remedy may require difficult and sensitive choices. Far from rushing out in search of a metropolitan remedy with which to torment the State defendants, the Court of Appeals has insisted that this Court's *Milliken I* remand for complete intra-district relief be complied with by the school officials and the district court.[57]

The Court of Appeals has not required nor expected the school officials to "chang[e] the racial residential patterns either within Detroit or between Detroit and other school districts", as feared by the State defendants.[58] Nor are the defendants expected to "purge their past sins" by controling residential patterns.[59] The Court of Appeals has made clear that what the school officials, local and state, are expected to do is to undo the present effects of their own illegal conduct, to the extent feasible.[60]

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[56] See particularly the Court's *Milliken II* decision, 433 U.S. at 282-83, where this Court noted: "But where, as here a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.' . . . The 'condition' offending the Constitution is Detroit's de jure segregated school system. . . ."

[57] Pet. App. pages 16a-19a.

[58] State brief at page 9.

[59] Ibid.

[60] As is clearly set forth in the April 14, 1980 Decision, Pet. App. pages 16a-19a, the Court of Appeals, while holding the district court to the task of correcting the "condition that offends the Constitution," *Swann,* 402 U.S. at 16, nonetheless goes to great pains to make clear its sensitivity to the difficult task before the district

Against the backdrop of our argument above, it is clear that the contention of the Detroit petitioners,[61] must be rejected because Detroit, unlike *Pasadena, Calhoun* and *Bradley,* has never achieved unitary status. Thus, the April 14, 1980 decision of the Sixth Circuit is not at war with either the Fourth or Fifth Circuit holdings, nor this Court's decisions.

The contention of the Detroit petitioners that the Court of Appeals ignored "The mandates of this Court regarding judicial review of desegregation plans which have yielded present neutral assignment patterns and policies".[62] has already been anticipated by the Court of Appeals in its April 14 decision:

> "The short answer to this argument is that a racially neutral assignment plan does not necessarily achieve a racially neutral attendance pattern. The Board's plan is limited by residential patterns which reflect past discrimination, as well as by district lines and transportation problems." [63]

As the Court of Appeals noted, quoting from this Court's decision in *Swann*:

> "The objective is to dismantle the dual school system. 'Racially neutral' assignment plans . . . may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from dis-

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court. In this connection, the Court of Appeals recognizes that some one-race schools may be unavoidable, that present assignment patterns should not be needlessly disrupted, and that practicalities such as transportation, time or distance might further limit additional desegregation.

[61] See Detroit brief at pages 11-16.

[62] Ibid, at pp. 17-20.

[63] Pet. App. at page 21a.

> criminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. . . . In short, an assignment is not acceptable simply because it appears to be neutral." [64]

The argument of the Detroit petitioners that the Sixth Circuit decision impermissibly ignored naturally integrated neighborhoods,[65] is simply a thinly-disguised invitation for this Court to ignore its own recognition that the courts below have the difficult task of balancing the various interests and equities in fashioning an appropriate remedial plan. There is nothing in the April 14 decision to even remotely suggest that the Sixth Circuit is either unmindful of or unconcerned about existing levels of desegregation or integration. In fact, just the opposite reality emerges from a reading of the Sixth Circuit's repeated acknowledgment of the flexibility which must be accorded the district court in shaping its remedy within constitutional frameworks.[66]

To the extent the Detroit Petition states a coherent argument in its complaints about "Token Integration by Trial and Error",[67] we assume it refers to the possibility that some additional schools may result with less than majority white status.[68] As Chief Justice Burger's opinion in *Milliken I* pointed out:

> "The suggestion in the dissent of Mr. Justice Marshall that schools which have a majority of Negro students are not 'desegregated' . . . finds no support in our prior cases. In *Green* . . . this Court approved a desegrega-

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[64] *Swann*, 402 U.S. at 28.

[65] Detroit brief, at pp. 21-23.

[66] Ibid, p. 23, n. 27.

[67] Detroit brief, pp. 23-25.

[68] Ibid., p. 23, n. 27.

> tion plan which would have resulted in each of the schools within the district having a racial composition of 57% Negro and 43% white. In *Wright* . . . the optimal desegregation plan would have resulted in schools being 66% Negro and 34% white . . . And in *U.S.* v. *Scotland Neck* . . . a desegregation plan was implicitly approved for a school district which had a racial composition of 77% Negro and 22% white. In none of these cases was it even intimated that 'actual desegregation' could not be accomplished as long as the number of Negro students was greater than the number of white students." [69]

While we do not agree with this reading that Justice Marshall was unconcerned about "the racial makeup of the school district's population and however neutrally the district lines have been drawn and administered", we do agree with the contention that desegregation is not made impossible in districts a majority of whose students are nonwhite. While there are practical limitations on the amount of desegregation which might be achieved, the requirement to eliminate the dual system does not vanish simply because the school officials may have been so successful in their prior illegal behavior as to have driven the more mobile white families from the city and their students from the school district.

In light of the sound evidentiary and record basis for the decisions of the Court of Appeals, coupled with the full opportunity which will be afforded the Detroit and State petitioners on remand to offer such proofs as they may have to help guarantee that the remedy will be tailored to the adjudicated systemwide violations, this Court should reject the arguments of these petitioners and permit the

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[69] *Milliken I*, 418 U.S. at 747, n. 21.

Court of Appeals to continue supervising the, admittedly slow, progress towards a complete intra-district remedy within the bounds of feasibility. Specifically, this Court should reject the State petition in its entirety, and the issues raised by the Detroit petition at pages 11-25.

II.

The Court of Appeals Did Not Err in Its Treatment of the Issues Concerning Detroit's Hispanic Students.

The Detroit Board argued in the district court that Hispanic students should not be further involved in the reassignment portion of the desegregation plan, because such participation might disrupt on-going bilingual programs. The district court believed, and asserted, that the Detroit Board was actually permitting region 2 students, white and Hispanic, to be shielded from involvement on desegregative reassignments:

> ". . . your own statistical data shows that (the bilingual program as run by the Detroit Board) is resegregating the entire system and that is the seed for resegregating every region in the District." [70]

The district court comments prompted a motion to intervene, filed by the LULAC petitioners on behalf of Hispanic students and their parents fearful of losing bilingual programs.[71] The district court, under directions from the Court of Appeals to end its exclusion of schools from regions 1, 5 and 8, ordered the Detroit Board to develope a

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[70] April 28, 1978 district court Transcript, quoted in the LULAC brief at pages 3-4.

[71] LULAC brief, pp. 4-5.

plan which would pair region 1 and region 2 schools.[72] The district court also denied the LULAC intervention.[73]

The Court of Appeals was urged by LULAC to reverse the denial of intervention, under both F.R.C.P. 24(a) and 24(b). The Detroit Board urged the Court of Appeals to reverse the district court's conclusion that Hispanics in Detroit should be treated as white for desegregation purposes, and specifically urged the Court of Appeals to vacate the order requiring desegregative pairings between region 1 and 2 schools. The Court of Appeals declined to order the LULAC intervention,[74] though it urged the district court to consider granting *amicus* status,[75] and concluded that the record did not permit a decision on whether Hispanics could be treated as white for desegregation in Detroit.[67] In order to provide a record basis for appellate review, the Court of Appeals instructed the district court to hold an evidentiary hearing to determine whether prior school district conduct towards Hispanics was *de jure* discrimination, and accorded LULAC full party status to litigate that issue in the district court.[77] These Court of Appeals decisions prompted the Detroit Board to challenge the propriety of the remand for evidentiary hearings, and led to the LULAC challenge of the Court of Appeals refusal to reverse the denial of intervention.

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[72] Pet. App. at pp. 76a-80a, the district court orders of August 7, 1978 and November 17, 1978.

[73] LULAC Appendix, at pages 1-4.

[74] Pet. App. at pp. 32a-34a.

[75] Ibid., p. 34a.

[76] Ibid., p. 24a.

[77] Ibid., pp. 24a-25a.

A. *The Court of Appeals Did Not Err in Ordering a Limited Remand on the Issue of Prior School District Treatment of Hispanic Students*

The Detroit Board, in urging this Court to grant review of the remand on Hispanic treatment, relies on *Keyes* for the propositions that "the presence or absence of segregation in a school does not determine whether Hispanics are black or white",[78] and "no hearing or factual findings are necessary to conclude, as a matter of law, that Hispanics should not be treated as white in this case",[79] and "they are, like blacks, an ethnic minority which suffers from the same discrimination and disadvantages as blacks when compared to whites".[80]

This Court's determination in *Keyes* was that the district court erred in not counting as segregated those schools which had a combined predominance of blacks and Hispanics, and based that determination on the:

> "agreement that, though of different origins, Negroes and Hispanics in Denver suffer identical discrimination in treatment when compared with treatment afforded Anglo students." [81]

Thus, the *Keyes* Court found disadvantage to have flowed from the historical Southwestern discrimination against Hispanics. Here, the Detroit petitioners contend that the discrimination flows from being disadvantaged.

Nor are the Detroit petitioners aided by the other cases cited for their position on this matter. For instance, *Booker* v. *Special District No. 1,* 585 F.2d 347, 354 (8th Cir. 1978),

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[78] Detroit brief, at pp. 29-30.

[79] Ibid., at p. 28.

[80] Ibid., at p. 29.

[81] *Keyes,* 413 U.S. at 197-198.

concerns the "separate classification and treatment of Indians," as does *U.S.* v. *Antelope,* 430 U.S. 641 (1977), *Moe* v. *Salish and Kootenan Tribes,* 425 U.S. 463 (1976), *Fisher* v. *District Court,* 424 U.S. 382 (1976), and *Morton* v. *Mancari,* 417 U.S. 535 (1974).

Evans v. *Buchanan,* 416 F. Supp. 328 (1976) and *Morgan* v. *Kerrigan,* 401 F.Supp. 216 (1975) each represent instances in which district courts exercised their discretion to permit intervention during remedial phases. Neither case stands for the constitutional position being asserted by the Detroit petitioners; namely, federal courts are required to disregard the factual circumstances which surround the treatment of Hispanics. The Detroit petitioners would erect an irrebutable presumption of similar historic experiences or treatment as between blacks and Hispanics, without regard to locale or other historical or factual circumstances. We find no warrant for such a position in the decisions of this Court.[82]

Accordingly, we urge this Court to reject the Detroit position that no careful and sensitive inquiry need be made by federal courts to determine the extent to which, if at all, desegregation decrees may need to be expanded to include all those victimized by the illegal conduct of public school officials. We believe the Hispanic students are entitled to demonstrate the full range, if any, of harmful impacts caused by the *de jure* acts of school officials, as is permitted by the Sixth Circuit remand. Notwithstanding the Detroit Board's distortions, more is at stake here than simply determining "the racial classification of Hispanics."[83] The remand hearing ordered by the Sixth Circuit opinion and

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[82] See discussion by the Court of Appeals, Pet. App. at pp. 22a-24a.

[83] Detroit brief, at pp. 28-30.

challenged by the Detroit petitioners will determine, among other things, whether Hispanic students have been deprived of constitutional rights under the precedents of this Court. We are not surprised that the Detroit Board would rather not have such an inquiry undertaken. This Detroit Board discomfort at what might be revealed in the prospective remand hearing does not, however, rise to a constitutionally cognizable level.

B. *The Court of Appeals Did Not Err in Affirming the District Court's Denial of LULAC Intervention*

In our view, the application of the LULAC intervenors was timely filed, and their participation in the litigation would not unduly delay the proceedings. We take no view on the likelihood that the Detroit Board will be able to represent the Hispanic interests in these proceedings. We only note, in this regard, the passion with which the Detroit Board has sought to shield white students from full involvement in desegregation, and do not expect similar passion on behalf of the District's Hispanic students. We do not question the ability or desire of LULAC to represent Hispanic interests in desegregation matters, generally, or this case in particular.

Notwithstanding our views about the feasibility of LULAC participation, we do not believe the Court of Appeals committed reversible error in affirming the district court denial of intervention. While the district court would have been, and still is, within the sound exercise of its discretion in granting the intervention sought, it was equally entitled to exercise its discretion to deny intervention at this time.[84] Under these circumstances we do not

[84] We do not read the cases cited by LULAC to *require* intervention under the factual circumstances which here prevail, to the extent the cases are relevant at all. For instance, 7 of the cases

believe the Court of Appeals action provides a basis for granting the LULAC petition for certiorari. Our view is grounded on two observations. First, as noted by the Sixth Circuit, the district court has already instructed the Detroit school officials to "make provisions for bilingual/bicultural programs" and to create new programs (where necessary) to maintain the current level of bilingual/bicultural offerings.[55] Secondly, the Sixth Circuit remand on the issue of whether *de jure* segregation of Hispanics has occurred will provide, in light of the intervention status accorded LULAC for the remand, an even broader opportunity for the assertion and protection of Hispanic interests.

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have facts rooted in commercial or labor disputes of various types: *Atlantis Devel. Corp.* v. *U.S.*, 379 F.2d 818 (5th Cir. 1975); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 368 U.S. 129 (1967); [*Innis, Speiden & Co.* v. *Food Mach. Corp.*, 2 F.R.D. 261 (D. Dela., 1942);] *Kozak* v. *Wells*, 378 F. 2d 104 (8th Cir. 1969); *McDonald* v. *E.J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1972); *Trbovich* v. *U.M.W.*, 404 U.S. 528 (1972). We have already expressed the view that LULAC's participation would occasion no undue delay. We, therefore, need not comment on the other cases cited in support of these propositions: *Atkins* v. *Bd. of Educ.*, 418 F.2d 784 (4th Cir. 1969); *Dowell* v. *Bd. of Educ., Oklahoma City*, 420 F.2d 865 (10th Cir. 1970); *Evans* v. *Buchanan*, 416 F.Supp. 328 (D. Del. 1976); *Hatton* v. *Cty. Bd. of Educ.* 422 F.2d 457 (6th Cir. 1970) *Keyes* v. *School Dist. No. 1*, 380 F.Supp. 673 (D. Colo. 1974); *NAACP* v. *New York*, 413 U.S. 345 (1973); *Pate* v. *Dade County School Board*, 303 F.Supp. 1068 (S.D. Fla. 1969); *Robinson* v. *Shelby County Bd.*, 330 F.Supp. 837 (W.D. Tenn. 1971); *U.S.* v. *Georgia*, 428 F.2d 277 (5th Cir. 1970); *U.S.* v. *Jefferson Cty. Bd.*, 372 F.2d 836 (5th Cir. 1966). We agree with LULAC that *permission* to intervene would not have been error. The facts of the Boston case, *Morgan* v. *Kerrigan*, 410 F.Supp. 216 (D. Mass. 1975), are clearly distinguishable from those at bar. There, the black plaintiffs proposed to Hispanic representatives the desirability of intervention, because of our uncertainty about the impact of student reassignments on the bilingual programs we believed sanctioned and required by this Court in *Lau* v. *Nichols*, 414 U.S. 563 (1974).

[55] Pet. App. at p. 34a. Also, see LULAC Appendix at pp. 8-9.

Accordingly, we urge this Court to reject the LULAC petition challenging the Sixth Circuit's refusal to reverse the district court's denial of intervention.

CONCLUSION

For the reasons set forth above, we urge this Court to deny each and every one of the three petitions for certiorari filed from the April 14, 1980 Sixth Circuit decisions and orders. In our view, these decisions simply require the local and state defendants to adhere to this Court's original intent on remand from *Milliken I* that a plan issue for converting the Detroit dual system to a unitary system. No such plan has yet been completed, because of the persistence of the Detroit Board and district court in distorting the previous liability findings to suit their current perceptions of reality or expediency. The previous *de jure* findings explicitly involved all schools in all regions of the Detroit public school system. It is not error for the Court of Appeals to expect and demand that the district court's remedy reach as many of those racially segregated schools and benefit as many of those schools' harmed students as is feasible under the circumstances. As the Court of Appeals noted in its remand:

> "There are now 66,650 students attending schools in Regions 1, 5 and 8. The remedial measures implemented to date afford none of these students any relief from de jure segregation."[55]

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[55] Pet. App. at p. 21a. Plaintiffs point out the irony that, after two trips to the Supreme Court and numerous hearings before the Court of Appeals and the district court, the schools in which Ronald Bradley, the lead Plaintiff, suffered his educational deprivations continue to be rigidly segregated because of the resistance of the Detroit Board and the decisions of the district court.

Nor was it error for the Court of Appeals to affirm the district court denial of intervention, order an evidentiary hearing to determine the extent of prior discrimination against Hispanics as a predicate for further remedial relief if needed, or grant LULAC intervention status to litigate on behalf of Hispanic students in the contemplated remand hearing.

There will be ample time, after the proceedings directed by the Court of Appeals have been conducted, to determine whether the district court and Court of Appeals decisions comport with the teachings of this Court. At this time, the case is not in a posture which warrants the Writs sought and they, like those sought in the Dallas case, would be improvidently granted at this time.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LULAC COUNCIL No. 11054, et al,

Intervenors-Petitioners,

vs.

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al,

Respondents,

and

RONALD BRADLEY, et al,

Respondents,

and

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, MICHIGAN, et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in affirming a denial of intervention to individual Spanish-surnamed children and Hispanic organizations who sought to assert the interest of Hispanic students in bilingual programs?

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No. 80-104

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LULAC COUNCIL No. 11054, et al,

Intervenors-Petitioners,

vs.

WILLIAM G. MILLIKEN, Governor of the State of Michigan, et al,

Respondents,

and

RONALD BRADLEY, et al,

Respondents,

and

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF DETROIT, MICHIGAN, et al,

Respondents.

DETROIT BOARD BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Board of Education Of The School District Of The City of Detroit and other named Detroit Board Respondents [Detroit Board], submit this Brief in Opposition to the Petition for Certiorari heretofore filed by the LULAC Intervenors.

The LULAC Intervenors challenge a decision rendered in this cause on April 14, 1980 by the United States Court of Appeals for the Sixth Circuit affirming the District Court denial of intervention. Their purported reason is the protection of bilingual education programs within the context of a desegregation plan to remedy prior racial discrimination.

While the Detroit Board took no position on the inter-

vention issue in the District Court and did not oppose intervention in the Court of Appeals, we do not believe the Sixth Circuit committed reversible error in affirming the District Court denial of intervention. As such, there is no justification, legal or otherwise, for the exercise of this Court's jurisdiction for certiorari.

A review of the record regarding this petition reveals that the Court of Appeals properly affirmed the denial of intervention while at the same time protecting the purported interest of the LULAC Intervenors by according them an *amicus* status in future remand proceedings to assist in evaluating any reassignments of Hispanic students.[1]

STATEMENT OF THE CASE

Respondents Detroit Board accept Petitioner LULAC Intervenors' statement of the case insofar as it sets forth the historical sequence giving rise to their petition. However, the Detroit Board cannot subscribe to their characterization of the trial court proceedings relative to the provision and implementation of bilingual education programs.

The District Court held evidentiary hearings in April and September, 1977 pursuant to the remand of the Sixth Circuit Court of Appeals for consideration of the efficacy of additional pupil reassignments using students from schools in Regions 1, 5 and 8 of the school district. *Bradley* v. *Milliken*, 540 F.2d 229 (CA 6, 1976). While the Court erroneously assumed that bilingual programs for Hispanic students in Region 2 (where the majority of limited English speaking Hispanic students reside) were resegregating that Region, the Court never "expressed strong reservations about the need to continue bi-

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[1] *Bradley* v. *Milliken*, [CA 34a]. References to the Sixth Circuit's opinion, as reprinted in the original Petition Appendix to the Detroit Board Petition, No. 80-48 are made as follows: [CA 1a, *et seq*].

lingual education programs as desegregation occurred."[2] [Tr, April 24, 1978 at 59-64].

The August 7, 1978 order of the District Court is the best evidence of the position of the Court with regard to the provision for bilingual/bicultural programs, within the context of the desegregation plan. The Court specifically ordered the Detroit Board to continue to provide such programs consistent with state law and the prior orders of the Court. Where proposed pupil assignments would have materially altered the current bilingual/bicultural programs, the Detroit Board was obligated to create new programs to maintain the current level of offerings. [76a-77a of Detroit Pet. App.]

On August 21, 1978, the Detroit Board filed its Proposed Pupil Reassignment Plan pursuant to the District Court order of August 7, 1978. The plan was intended to be implemented with a bilingual-sensitive assignment policy.

SUMMARY OF ARGUMENTS

While Petitioner LULAC's Motion to Intervene may arguably be found to be timely and not prejudicial to the existing parties, two reviewing Courts have determined, without contrary evidence being offered by Petitioners, that Petitioners' interest is adequately represented by existing parties resulting in no right to intervene.

The provision and implementation of bilingual education programs has never been and is not now an issue in this school desegregation case. The right to such programs and the Detroit Board's demonstrated concern for preserving those programs within the context of pupil transportation, has been acknowledged by the parties and fully protected by the District Court and the Court of Appeals. As such, the decision of the Court of Appeals affirming the District Court's denial

[2] LULAC brief at 3.

of intervention is not in conflict with any decisions of other circuits cited by Petitioners.

A review on Writ of Certiorari is not a matter of right but of judicial discretion, granted only when there are special and important reasons advanced. Petitioners have failed to set forth the threshold requirements for vesting jurisdiction in this Court.

ARGUMENT

I.

The Court of Appeals Did Not Err In Affirming The District Court's Denial Of LULAC Intervention.

While the Detroit Board does not question the general ability or desire of the LULAC Intervenors to represent the Hispanic interests in this case[3], we do not believe the Court

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[3] In a related inquiry, the question of the standing of the proposed organization intervenors was never argued. However, a review of the record indicates that the organizations failed to allege in their pleadings that they had suffered any individual harm as a result of the on-going desegregation requirements. Essentially their allegations amount to an "interest" in a pending lawsuit. A test of representative standing is whether the interests sought to be protected are arguably within the zone of interests to be protected by the statute or constitutional guarantee in question; that interest requires the party seeking review to be among the injured. *Association of Data Processing Organizations* v. *Camp*, 397 U.S. 150, 153 (1970); *Sierra Club* v. *Morton*, 405 U.S. 727, 731-732, 734-735 (1972).

Supposed expertise and long-standing interest in an issue is insufficient in itself to render an organization adversely affected or aggrieved for purposes of standing. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Warth* v. *Seldin*, 422 U.S. 490 (1975); *Sierra Club, supra*, 405 U.S. at 739. Even if the LULAC Intervenors had an interest which could be impaired and which was not being adequately represented by existing parties, intervention would only be proper for those who have

of Appeals committed reversible error in affirming the denial of intervention by the District Court.

Rule 24(a) of the FRCP states the basis for an intervention of right:

> "Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

While Petitioner LULAC's Motion to Intervene may arguably be found to be timely and not prejudicial to the exististing parties.[4] The Court of Appeals concluded that the interest purportedly sought to be protected by Petitioners was adequately represented by existing parties thereby giving no right to intervene. Specifically, the Court stated:

> "We agree with the district court that appellants have no right to intervene, . . . [W]e think appellants' interest is adequately represented by the Detroit Board. Dr. Felix Valbuena, the Director of Bilingual Education for the Detroit school system cautioned the court that reassigning Hispanic students out of Region 2 schools, let alone doing so indiscriminately, would jeopardize the district's ability to provide quality bilingual education as required by law." [Ca 33a-34a].

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standing to enter the litigation. *United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208 (1974).

[4] The District Court expressly found the motion to be untimely and prejudicial. [LULAC App. at 3-4, 8].

Thus, while petitioners may well have a substantial interest in the provision of bilingual education programs for Hispanic students of limited English speaking ability, that interest has been found by two reviewing courts to be an interest which is properly and adequately represented by existing parties.

Contrary to the thrust of the petition, the need for the provision for an implementation of bilingual education programs has never been and is not now a viable issue in this school desegregation case. The right to such programs and the Detroit Board's demonstrated concern for preserving those programs within the context of the pupil reassignment component of the desegregation plan has never been questioned. Indeed, the Detroit Board was the party which initially raised the concern with the District Court that additional pupil reassignment, if not sensitive to the needs of Hispanic students of limited English speaking ability, might impact on the bilingual education program. In acknowledgment of that concern, the Court, in its August 7, 1978 Order requiring the Detroit Board to submit a plan for additional pupil reassignments, provided *inter alia*:

> "The plan shall make provisions for bilingual/bicultural programs consistent with state law and prior orders of this court; where pupil reassignment materially alters current bilingual/bicultural programs, the Detroit Board shall create new programs to maintain the current level of bilingual/bicultural offerings." [76a-77a of Detroit Pet. App.].

There has been no contention, and there is no evidence to sustain such a contention, that the Detroit Board violated the foregoing provision of the Court. On the contrary, on August 21, 1978, the Detroit Board filed its Proposed Pupil Reassignment Plan which was intended to be implemented with a bilingual-sensitive pupil assignment policy.

Based upon a review of the record, the Court of Appeals

concluded that the Detroit Board adequately represented the purported interest of intervenors by stating:

> "We have every reason to believe the Board has and will continue to observe the court's order. Given the Board's demonstrated concern for preserving its bilingual programs, we think the appellants' interest already is adequately represented. Accordingly, we affirm the district court's decision that appellants are not entitled to intervene of right." [Ca 34a].

Having concluded that petitioners were not entitled to intervene of right, the Court of Appeals determined that the District Court did not abuse its discretion by denying permissive intervention in the remedy stage of proceedings. The perceived basis for denial of permissive intervention under Rule 24b of the FRCP was the inherent delay which would be occasioned without producing any counterveiling benefit. [Ca 34a].

Read in its entirety, the decision of the Court of Appeals affirming the denial of intervention does not result in a conflict with other federal courts of appeal. The decisions offered by petitioners do not stand for the proposition that intervention under the facts presented here, is required. While the Court of Appeals might have properly exercised its discretion by granting permissive intervention, it cannot be said that it was an abuse of discretion to have denied permissive intervention in this matter.

A review on Writ of Certiorari is not a matter of right. Such a review rests on sound judicial discretion and is granted only when there are special and important reasons advanced. The LULAC Intervenors have not presented a case which is in conflict with a decision of another federal court of appeals; nor have they presented a case which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Fur-

thermore, in light of the fact that petitioners have been accorded an *amicus* status in future remand proceedings to assist in evaluating any reassignments of Hispanic students, the protection of Hispanic interests has been safeguarded.[5]

Petitioners have thus failed to set forth the threshold requirements for vesting jurisdiction in this Court and their petition should accordingly be denied.

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[5] In the companion case decided by the Sixth Circuit on April 14, 1980 and which is the subject matter of separate petitions in this court being Nos. 80-31 and 80-48, the Court held that the LULAC Intervenors here must be permitted to intervene to present evidence on the question of whether the defendants practiced *de jure* segregation of Hispanics. Depending upon the results of the inquiry, the trial court will then be in a position to determine whether to treat Hispanics as "white" or "minority". The Detroit Board contends there is no basis for such a requirement by the Court of Appeals. However, that issue is not a part of this matter although Plaintiffs' consolidated Brief In Opposition To Certiorari tends to blur this distinction.

CONCLUSION

For the foregoing reasons, the Petition of LULAC Council No. 11054, et al for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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Detroit, Michigan

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NO. 80-104

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

LULAC COUNCIL 11054, et al

Petitioners,

RONALD BRADLEY, et al,

v

WILLIAM G. MILLIKEN, et al, and the BOARD OF EDUCATION OF THE CITY OF DETROIT, et al,

Respondents.

BRIEF FOR RESPONDENTS WILLIAM G. MILLIKEN, ET AL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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October Term, 1979

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v

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Respondents.

BRIEF FOR RESPONDENTS WILLIAM G. MILLIKEN, ET AL, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents Milliken, et al, accept petitioners' statement of the case except for their description of the trial court hearings pursuant to the Court of Appeals remand and of the District Court's subsequent order of August 7, 1978, as it pertained to provision of bilingual, bicultural programs.

The United States Court of Appeals for the Sixth Circuit remanded this cause to the District Court for consideration of further pupil reassignments, by an opinion and order dated August 4, 1976 (540 F2d 229). The District Court held eviden-

tiary hearings in April and September, 1977. Briefs were then filed by the parties and the Court heard oral arguments in April, 1978. During these oral arguments, the Court expressed a concern about the effect on the Court's pupil reassignment order of concentrating the school district's bilingual programs in one of the school district's eight regions. (Tr, April 24, 1978, pp 58-59)

Contrary to petitioners' assertion, the Court never expressed reservations about the need to continue bilingual education programs as desegregation occurred. Rather, the Court expressed a concern that concentration of bilingual programs in one region and exclusion of students participating in such programs from the pupil reassignment remedy was resulting in resegregation in that region. (Tr, April 24, 1978, pp 59-65)

In its order of August 7, 1978, the District Court did not simply order the school district to submit a pupil reassignment plan which "should 'make provisions for bilingual bicultural programs . . . '" as asserted by petitioners. Rather, the order was specific and mandatory. It required that:

> "The plan shall make provisions for bilingual/bicultural programs consistent with state law and prior orders of this court; where pupil reassignment materially alters current bilingual/bicultural programs, the Detroit Board shall create new programs to maintain the current level of bilingual/bicultural offerings."
> (Order of August 7, 1978, p 1, ¶ 3)

SUMMARY OF ARGUMENTS

Petitioners' motion to intervene, which was filed months after all hearings were concluded and after the District Court had already prepared its opinion, was untimely. The filing of the motion was unduly delayed. Granting of the mo-

tion would have necessitated further hearings, prejudiced the original parties and protracted the remedial proceedings for no good reason.

Provision of bilingual, bicultural education programs has never been an issue in this school desegregation case. Petitioners' right to such programs has been acknowledged by all parties and fully protected by the District Court. The decision of the Court of Appeals affirming the District Court's denial of the motion to intervene is not in conflict with decisions in other circuits.

The District Court and Court of Appeals correctly held that the Detroit Board of Education adequately represents petitioners' interest. In addition, plaintiffs adequately represent petitioners' interest and no other party has contested that interest.

ARGUMENT

I.

PETITIONERS' MOTION TO INTERVENE IS UNTIMELY.

Intervention of right or by permission may be granted only "upon timely application." FR Civ P, 24. At the time of petitioners' application on July 24, 1978, this case had been pending for almost eight years. The Court of Appeals had ordered consideration of further pupil reassignment by an opinion and order dated August 4, 1976. (540 F2d 229) The District Court held evidentiary hearings in April and September, 1977. Briefs were filed and the Court heard oral arguments in April, 1978. Well over three months after this argument and only two weeks before the District Court issued its opinion (460 F Supp 299), petitioners finally filed their motion to intervene.

In denying petitioners' motion to intervene, the District Court held:

> " . . . [T]his motion is untimely. LULAC did not apply for intervention until long after the evidentiary hearings were over and our opinion was prepared for filing. . . ." (A3)[1]

The Court also noted:

> "In addition, we decline to allow the proposed intervenors to intervene under Fed. R. Civ. P. 24(b). The motion to intervene is simply much too late. If the court were to allow intervention, the parties would have to relitigate issues that have already been extensively litigated at great expense. . . ."
> (A4)

Even under a liberal construction of the timeliness requirement, petitioners' motion to intervene was simply too late. Under the circumstances of the case, petitioners unduly delayed in the filing of their motion and permitting intervention would have prejudiced the original parties to the litigation. The April, 1978 proceeding which petitioners allege triggered their concern was the hearing of final oral arguments on a revised pupil reassignment plan. The evidentiary hearings had been completed months earlier. Briefs had been submitted weeks earlier.

After oral arguments were concluded, the Court began preparing its opinion. Anyone desiring to give further input to the Court at that point obviously needed to move with dispatch. Petitioners did not. Instead, they waited three months.

---

[1]

References to pages in the appendix of petitioners' Petition for Writ of Certiorari will be designated (A.....).

By the time their motion to intervene was finally filed, the Court had already completed its opinion. The District Court expressly noted this fact as one of the reasons for denying the motion (A3)

Had intervention been permitted, at a minimum the Court would have been required to delay issuance of its opinion and to reopen the hearings to afford petitioners an opportunity to present their position. Petitioners assert that they only sought to participate in further hearings regarding issues yet to be resolved, but this cannot be so. Their concern was the impact on bilingual, bicultural programs of the pupil reassignment plan implemented by the District Court pursuant to its August 7, 1978 opinion and order. The Court could hardly have granted petitioners' motion to intervene and found thereby that they did have an interest which was subject to impairment and that they were not adequately represented and at the same time denied them any opportunity to present their position prior to its decision.

Granting of petitioners' motion to intervene clearly would have delayed conclusion of the remand proceedings. It would have necessitated further hearings and, at a minimum, partial relitigation of issues. Such a result would have been prejudicial to the original parties. As the Court of Appeals noted:

> ". . . This case is already ten years old. Permitting the appellants to participate as parties in the development of a supplemental reassignment plan would delay further these already protracted remedial proceedings without producing any countervailing benefit." (A8)

Petitioners' motion to intervene was both unduly delayed and prejudicial to the original parties. The motion was clearly untimely under the circumstances and was properly denied by the District Court.

II.

NO INTEREST OF PETITIONERS IS SUBJECT TO IMPAIRMENT IN THE PRESENT ACTION.

Petitioners may well have a substantial interest in the provision of bilingual, bicultural programs to students of limited English-speaking ability. Such an interest is not, however, necessarily or automatically an interest related to the subject matter of this action. This is a school desegregation case. There is no necessary nexus between provision of bilingual education and school desegregation. Thus, in order to establish an interest in this litigation within the meaning of FR Civ P, 24, petitioners must at least demonstrate that the District Court's orders impact on the provision of bilingual, bicultural education programs.

In their motion to intervene, petitioners merely alleged that remedial orders may impair their ability to protect their interests in bilingual programs. In their proposed complaint, they alleged that they are entitled to bilingual programs and that their interests must be taken into account. Not a single fact was alleged in either their motion to intervene or their proposed complaint to indicate that their statutory rights to a bilingual education have not been or will not continue to be respected. Neither the District Court nor any party has ever disputed their claim to certain bilingual education programs. Indeed, their right to bilingual education programs has been expressly acknowledged by the Court and the parties and such programs have been and continue to be provided.

In its order of August 7, 1978, directing the Detroit Board of Education to prepare a pupil reassignment plan, the District Court expressly required that:

> "The plan shall make provisions for bilingual/bicultural

> programs consistent with state law and prior orders of this court; where pupil reassignment materially alters current bilingual/bicultural programs, the Detroit Board shall create new programs to maintain the current level of bilingual/bicultural offerings."
> (Order of August 7, 1978, p 1, ¶ 3)

The Detroit Board prepared a plan and petitioners were permitted to file a response to that plan in the District Court even though their motion to intervene had been denied. In that response, petitioners stated:

> ". . . The plan merely indicates that certain numbers of children will be transferred between different schools. If those children are chosen arbitrarily without concern for bilingual needs, it is a virtual certainty that programs will be damaged.
>
> "It may be that the District intends to implement the submitted proposal by a bilingual-sensitive assignment policy. If so, the concerns expressed here may be unnecessary; however, there is no reflection of the intent to do this in the documents submitted. . . ." (Response of Hispanic Intervenors to Plans Proposed by the Detroit Board of Education, dated August 31, 1978, p 2)

The District Court has ordered the Detroit Board of Educa- to respect petitioners' statutory right to bilingual education programs. Petitioners themselves have admitted that their concerns can be protected under the reassignment plan submitted by the Board. The mere speculative possibility that despite all of this, petitioners' concerns might not be respected is not a sufficient interest to warrant intervention.

In *Moten* v *Bricklayers, Masons and Plasterers International Union of America,* 543 F2d 224 (CA DC, 1976), an employer sought to intervene in a civil rights action against a union just

prior to entry of a settlement order, expressing concern that provisions of the order might subject him to conflicting demands. The District Court denied intervention, noting that it would retain jurisdiction and only expected the employer to act in good faith. The Court of Appeals affirmed, stating at 543 F2d 234:

> "Upon our own construction of District Judge Robinson's judgement and order, upon our reading of his memorialization of good faith within the rubric of continuing jurisdiction, and upon the argument held before us, we are satisfied that the instant agreement can be given life without impairing or impeding the protection of any valid interests of employer Izzo (the only employer before us) and of other employers not party to this appeal."

So also here, the reassignment plan ". . . can be given life without impairing or impeding the protection of any valid interests . . ." of petitioners. The District Court has repeatedly indicated that it will protect bilingual/bicultural programs. If and when petitioners' statutory rights are ever actually threatened is soon enough to invoke the District Court's protection.

The conflict alleged by petitioners between the Court of Appeals decision in this case and other appellate decisions is nonexistent. In both *Morgan* v *Kerrigan,* 401 F Supp 216 (D Mass, 1975), *aff'd,* 530 F2d 401 (CA 1, 1976), *cert den,* 426 US 935, and *Evans* v *Buchanan,* 416 F Supp 328 (D Del, 1976), *aff'd in part,* 555 F2d 373 (CA 3, 1977), *cert den,* 434 US 880, *reh den,* 434 US 944, Hispanic organizations were permitted to intervene to represent students participating in bilingual education programs. The opinions cited by petitioners merely note that intervention was permitted. They are not rulings on motions to intervene. The opinions do not indicate why intervention was sought or permitted, whether it was opposed by any

party or what relationship existed between bilingual programs and the desegregation remedy. Respondents acknowledge that intervention may be appropriate in some cases. They simply assert, as the District Court and Court of Appeals found, that intervention is not appropriate in this case.

III.

PETITIONERS' INTEREST IS ADEQUATELY REPRESENTED BY EXISTING PARTIES.

Even if petitioners LULAC Council No. 11054, et al, had any interest which was subject to impairment, they still would have no right to intervene because their interest is adequately protected by existing parties.

In its memorandum and order denying petitioners' motion to intervene, the District Court held:

> "In any event, the defendant Detroit Board has more than adequately protected the interests of the proposed intervenors. At the latest hearings, the Detroit Board called as an expert witness Mr. Felix Valbuena, the Director of Bilingual, Bicultural Education for the Detroit Public Schools. *See* transcript, September 7, 1977, at 96. Mr. Valbuena made a careful presentation of the bilingual program in the city and explained the need to preserve those programs. The Detroit Board vigorously opposed every suggestion that would disturb current bilingual programs in Region 2. *See* Opinion, August 17, 1978 at 23-24. We are persuaded that the proposed intevenors could not have presented any better evidence in their own behalf." (A3)

The District Court also noted:

> "... Moreover, the intervenors could not possibly match the expertise of the Detroit Board in Bilingual/Bicultural Education. Since the Detroit Board and the intervenors have identical goals, no useful purpose could be served by granting intervention pursuant to Rule 24(b)." (A4)

The Court of Appeals expressly affirmed these holdings. (A7-8)

In addition, this case has been certified as a class action in which plaintiffs represent "all school children in the City of Detroit, Michigan" and "all Detroit resident parents who have children of school age." See *Bradley* v *Milliken*, 338 F Supp 582 (DC ED Mich, 1971). The individual petitioners obviously are members of that class.

The District Court held that plaintiffs did not adequately represent petitioners because it understood petitioners to be seeking exclusion from any pupil reassignment plan. (A2-3) However, petitioners stated in their brief in the Court of Appeals and in their petition for writ of certiorari that they do not seek exclusion from the pupil reassignment plan but rather only seek to ensure that the integrity of bilingual education programs is taken into account in implementing the reassignment plan. (See, e.g., pp 8-9 of the petition) As noted previously, the District Court has already ordered the Detroit Board to do so.

As petitioners are willing to participate in the pupil reassignment plan, there is, in fact, no conflict between their position and plaintiffs'. They are members of the class which plaintiffs represent. There is no reason why plaintiffs cannot adequately represent their interests. In fact, plaintiffs, in both their brief and oral argument in the Court of Appeals, asserted their willingness and ability to represent petitioners' interests.

As their interests are adequately represented by both plaintiffs and the Detroit Board of Education and are not contested by any other party, the District Court properly denied petitioners' motion to intervene of right on the ground that their interest was adequately represented by existing parties. [2] (A3-4)

---

[2]

The Court of Appeals suggested that petitioners be permitted to participate in future proceedings as *amici curiae* and that the District Court consider their *amicus* views in evaluating any reassignments of Hispanic students. (A8) Respondents Milliken, et al, have no objection to petitioners' participation on that basis. Respondents do not accept, however, the Court of Appeals holding that petitioners must be permitted to intervene to present evidence on the question of whether the defendants practiced *de jure* segregation of Hispanics. There is no basis in fact or law for such a holding where, as here, no one, including petitioners, has ever asserted such a claim.

CONCLUSION

For the foregoing reasons, the Petition of LULAC Council No. 11054, et al, for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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Dated: August 20, 1980

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